93-828

No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

REVEREND ROBERT PEARSON, ET AL.,
Petitioners,

- v. -

PLANNED PARENTHOOD MARGARET SANGER CLINIC (MANHATTAN), ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MICHAEL P. TIERNEY
A. LAWRENCE WASHBURN, JR.
KARIN M. BURKE
Legal Center for Defense of Life
210 East 23rd Street, Suite 5F
New York, NY 10010
(212) 685-1360

JOSEPH P. SECOLA
(Counsel of Record)
McCarthy & Secola
P.O. Box 1108
8 South Main Street
New Milford, CT 06776
(203) 355-0923

WILLIAM P. HARRINGTON
Bleakley Platt & Schmidt
One North Lexington Avenue
P.O. Box 5056
White Plains, NY 10602
(914) 949-2700

JOHN F. SWEENEY
GABRIEL P. KRALIK
Morgan & Finnegan
345 Park Avenue
New York, NY 10154
Attorneys for Petitioners

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White Plains, NY 10602
(914) 949-2700

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GABRIEL P. KRALIK
Morgan & Finnegan
345 Park Avenue
New York, NY 10154
Attorneys for Petitioners

QUESTIONS PRESENTED

1. In *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 443 (1911), this Court declared that, in the context of contempt proceedings, the "distinction between *refusing to do an act commanded* (remedied by imprisonment until the party performs the required act), and *doing an act forbidden* (punished by imprisonment for a definite term)" is a distinction that is "sound in principle, and generally, if not universally, afford[s] a test by which to determine the [civil or criminal] nature of the punishment." 221 U.S. at 443 (emphasis added). *See also, Hicks v. Feiock*, 485 U.S. 624 (1988) (reaffirming *Gompers* in context of contempt fines). Against this background, the first question presented here is:

   > Whether—as the Second Circuit Court of Appeals held below, and as is the growing trend in the lower courts—a contempt proceeding may be treated as civil in nature (so that none of the constitutional requirements for a criminal contempt proceeding need be followed) where the defendant is charged with having taken certain completed actions that were *prohibited* by previously imposed judicial orders, and where a finding by the court that the defendant took such prohibited actions leads to the sentencing of the defendant to pay to the court (or the state) substantial fines (in fixed amounts not measured by any harm suffered by a civil party) that the court had established at the time of its initial orders?

2. This Court has previously granted certiorari in this case *sub. nom. Pearson v. Planned Parenthood Margaret*

Sanger Clinic (Manhattan), ___ U.S. ___, 113 S.Ct. 1233, 122 L.Ed.2d 640 (1993) (Appendix C: A-7). In *Pearson*, this Court vacated the judgment of the court of appeals in *Terry II*, 961 F.2d 390 (2d Cir. 1992) (Appendix D: A-8 to A-37) and remanded for further consideration in light of *Bray v. Alexandria Women's Health Clinic*, 506 U.S. ____, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993). Against this background, the second question presented is:

> Whether the court of appeals erred in reinstating its initial judgment without modification (including an award of attorneys' fees of over $150,000.00 under 42 U.S.C. § 1988), following an order by this Court which vacated the judgment and remanded for reconsideration in light of *Bray v. Alexandria Women's Health Clinic*, 506 U.S. ____, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993), which held, on virtually identical facts, that 42 U.S.C. § 1985(3) does not provide a cause of action against anti-abortion demonstrators for obstructing access to abortion businesses and that therefore the Respondents are not entitled to attorneys' fees under § 1988?

PARTIES

The Petitioners are as follows: Reverend Robert Pearson, Reverend Jesse Lee, Joseph Foreman, Michael McMonagle, Jeff White, Christopher Slattery, Bistate Operation Rescue Network (B.O.R.N.), Randall A. Terry, Thomas Herlihy, and Operation Rescue.

The Petitioners were defendants and non-party contempt Respondents in the district court and appellants in the court of appeals. The following were defendants in the district court and were appellants in the court of appeals but are not presently Petitioners: Adele Nathanson, Florence Talluto and Michael LaPenna. Contempt was not sought against defendant Reverend James P. Lisante.

The Respondents are as follows: Planned Parenthood Margaret Sanger Clinic (Manhattan); New York State National Organization for Women; New York State Chapter of the National Organization for Women; National Organization for Women; Religious Coalition for Abortion Rights-New York Metropolitan Area; New York State National Abortion Rights Action League, Inc.; Planned Parenthood of New York City, Inc.; Eastern Women's Center, Inc.; Planned Parenthood Clinic (Bronx); Planned Parenthood Clinic (Brooklyn); Ob-Gyn Pavilion; The Center for Reproductive and Sexual Heath; VIP Medical Associates; Bill Baird Institute (Suffolk); Bill Baird Institute (Nassau); Dr. Thomas J. Mullin; Bill Baird; Reverend Beatrice Blair; Rabbi Dennis Math; Reverend Donald Morlan and Pro Choice Coalition. The Respondents were each plaintiffs in the district court and appellees in the court of appeals.

An Intervenor in the district court was the Respondent City of New York, which pressed a state law public nuisance claim. The City of New York did not seek contempt citations against either the defendants or non-party Petitioners in the proceedings

at issue in the courts below. The United States was a judgment creditor (by virtue of the contempt fines) in the district court and a creditor-appellee in the court of appeals.

Petitioners B.O.R.N. and Operation Rescue are not a corporations under Rule 28.1 of the Rules of this Court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES iii

DECISIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 4

A. Course of Proceedings 5

B. Statement of Facts 7

REASONS FOR GRANTING THE WRIT 9

I. The Purportedly Civil Contempt Fines and Penalties Issued By The District Court Rest On The Identical Legal Grounds at Issue in a Case Presently Before This Court, *International Union, United Mine Workers of America, and United Mine Workers of America, District 28 v. John L. Bagwell, Clinchfield Coal Co., and The "B" Mining Co.*, No. 92-1625 9

A. Issues Concerning The Constitutional Distinction Between Civil Contempt and Criminal Contempt 9

TABLE OF CONTENTS (cont'd)

II. This Court's Vacate and Remand Order in *Pearson* Requires The Court of Appeals to, at Minimum, Vacate its Judgment and Remand With Instructions to the District Court to Enter Judgment For Petitioners on the Federal Claims, Especially an Order to Vacate The Section 1988 Attorneys' Fees Award of Over $150,000. The Second Circuit's Refusal to Amend its Judgment in Light of *Bray*, Despite This Court's Mandate, Was Erroneous 19

CONCLUSION 26

TABLE OF CONTENTS (cont'd)

APPENDICES

Appendix A:	Denial of Petition For Rehearing and Suggestion For Rehearing En Banc by U.S. Court of Appeals for the Second Circuit, August 23, 1993, *New York State Nat'l Organization for Women v. Terry*, (unpublished)	A - 1
Appendix B:	*Per Curiam* Opinion of the U.S. Court of Appeals for the Second Circuit on Remand from the U.S. Supreme Court, July 2, 1993, *New York State Nat'l Organization for Women v. Terry*, 996 F.2d. 1351 (2d Cir. 1993).	A - 3
Appendix C:	Opinion of the U.S. Supreme Court, February 22, 1993, *Pearson v. Planned Parenthood Margaret Sanger Clinic (Manhattan)*, 113 S.Ct. 1233, 122 L.Ed.2d 640 (No. 92-282)	A - 7

TABLE OF CONTENTS (cont'd)

Appendix D:	Opinion of U.S. Court of Appeals for the Second Circuit, April 13, 1992, *New York State Nat'l Organization for Women v. Terry*, 961 F.2d 390 (2d Cir. 1992)	A - 8
Appendix E:	Order assessing contempt fines against Petitioner Christopher Slattery, November 8, 1990	A - 38
Appendix F:	Oral Bench Ruling of the U.S. District Court for the Southern District of New York, November 8, 1990	A - 40
Appendix G:	Opinion of U.S. District Court for the Southern District of New York, May 31, 1990, *New York State Nat'l Organization for Women v. Terry*, 737 F. Supp. 1350 (S.D.N.Y. 1990)	A - 54
Appendix H:	Order assessing contempt fines against Petitioners, May 8, 1990	A - 89
Appendix I:	Opinion of U.S. District Court for the Southern District of New York, February 27, 1990, *New York State Nat'l Organization for Women v.*	

TABLE OF CONTENTS (cont'd)

	Terry, 732 F. Supp. 388 (S.D.N.Y. 1990)	A - 92
Appendix J:	Permanent Injunction dated January 10, 1989	A - 147
Appendix K:	Preliminary Injunction dated October 27, 1988	A - 151
Appendix L:	Temporary Restraining Order dated May 5, 1988	A - 155

TABLE OF AUTHORITIES

CASES:

Aradia Women's Health Center v. Operation Rescue, 929 F.2d 530 (9th Cir. 1991) 11, 13

Bagwell v. International Union, United Mine Workers of America, 244 Va. 463, 423 S.E.2d 349 (1992), *cert. granted*, ___ U.S. ___, (June 1, 1993) (No. 92-1625) 13

Bell v. Hood, 327 U.S. 678, 90 L.Ed. 939, 66 S.Ct. 773 (1946) 23

Bray v. Alexandria Women's Health Clinic, 506 U.S. ___, 113 S. Ct. 753, 122 L.Ed.2d 34 (1993) 6, 19-24, 25n

Clark v. International Union, UMWA, 752 F. Supp. 1291 (W.D. Va. 1990) 13

Crozer-Chester Medical Center v. Moran, 522 Pa. 124, 560 A.2d 133 (Pa. 1989) 18n

Douglass v. First National Realty Corp., 543 F.2d 894 (D.C. Cir. 1976) 18n

TABLE OF AUTHORITIES (cont'd)

CASES: Page(s)

Doyle v. London Guarantee & Acci. Co., 204 U.S. 599, 51 L.Ed. 641 (1907) 17

Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) 25n

Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770 (9th Cir. 1983) 18n

Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 443 (1911) 9, 15

Harper v. Virginia Dept. of Taxation, ___ U.S. ___, 113 S. Ct. 2510 (June 18, 1993) 20

Hess v. New Jersey Transit Rail Operations, Inc., 846 F.2d 114 (2d Cir. 1988) 19n

Hicks v. Feiock, 485 U.S. 624 (1988) 10, 14, 15, 17

In re Christensen Engineering Co., 194 U.S. 458, 24 S. Ct. 729, 48 L.Ed. 1072 (1904) 15, 16

In re Grand Jury Witness, 835 F.2d 437 (2d Cir. 1987)

TABLE OF AUTHORITIES (cont'd)

CASES: Page(s)

cert. denied sub nom.
Arambulo v. United States,
485 U.S. 1039 (1988) 19n

In re Merchants' Stock &
Grain Co., 223 U.S. 639,
32 S. Ct. 339, 56 L.Ed. 584
(1912) 16

In re Stewart, 571 F.2d 958 (5th Cir. 1978) 18n

International Union, United Mine
Workers of America v. Bagwell,
cert. granted, ___ U.S. ___,
(June 1, 1993) (No. 92-1625) . . . . . 5, *passim*

Leecan v. Lopes, 893 F.2d 1434
(2d Cir.), *cert. denied*, ___
U.S. ___, 110 S. Ct. 2627,
110 L.Ed.2d 647 (1990) 14

Lovejoy Specialty Hosp. v.
Advocates for Life, Inc.,
802 P.2d 684 (Or. App. 1990),
pet. rev. dismissed as moot,
814 P.2d 511 (Or. 1991) 12

Michaelson v. United States,
266 U.S. 42 (1924) 17n

TABLE OF AUTHORITIES (cont'd)

CASES: Page(s)

National Organization for Women v. Operation Rescue, 914 F.2d 582 (4th Cir. 1990), *rev'd in part, vacated in part, remanded sub. nom. Bray v. Alexandria Women's Health Clinic*, 506 U.S. ___, 113 S. Ct. 753, 122 L.Ed.2d 34 (1993) 21, 22

National Organization for Women v. Operation Rescue, No. 90-985 (4th Cir. filed Feb. 11, 1993) 23n

New York State Nat'l Organization for Women v. Terry, 996 F.2d 1351 (2d Cir. 1993) 2, 6n

New York State Nat'l Organization for Women v. Terry (Terry II), 961 F.2d 390 (2d Cir. 1992), *vacated, remanded, sub. nom. Pearson v. Planned Parenthood Margaret Sanger Clinic (Manhattan)*, ___ U.S. ___, 113 S.Ct.1233, 122 L.Ed.2d 640 (1993) . . . . . 2, *passim*

New York State Nat'l Organization for Women v. Terry (Terry I), 886 F.2d 1339 (2d Cir. 1989), *cert denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed. 2d 532 (1990) . 4n, *passim*

TABLE OF AUTHORITIES (cont'd)

CASES: Page(s)

New York State Nat'l Organization for Women v. Terry, 737 F. Supp. 1350 (S.D.N.Y. 1990), *aff'd in part, rev'd in part*, 961 F.2d 390 (2d Cir. 1992), *vacated, remanded*, ___ U.S. ___, 113 S.Ct. 1233, 122 L.Ed.2d 640 (1993) 1, 23

New York State Nat'l Organization for Women v. Terry, 732 F. Supp. 388 (S.D.N.Y. 1990), *aff'd in part, rev'd in part*, 961 F.2d 390 (2d Cir. 1992), *vacated, remanded*, ___ U.S. ___, 113 S.Ct. 1233, 122 L.Ed.2d 640 (1993) 1, 7, 8

New York State Nat'l Organization for Women v. Terry, 704 F. Supp. 1247 (S.D.N.Y. 1989), *aff'd as mod.*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d 532 (1990) 5n, 7, 8, 22

Nye v. United States, 313 U.S. 33 (1941) 15, 17n

Pearson v. Planned Parenthood Margaret Sanger Clinic (Manhattan), ___ U.S. ___, 113 S.Ct. 1233, 122 L.Ed.2d 640 (1993) . . 2, 6, 19

Penfield Co. of California v. Securities & Exchange Commission, 330 U.S. 585 (1947) 15, 17

TABLE OF AUTHORITIES (cont'd)

CASES: Page(s)

People v. McDaniel, 154 Misc. 2d 89, 593 N.Y.S.2d 154 (App. Term), *appeal denied*, 81 N.Y.2d 889, 613 N.E.2d 982 (1992) 15n

Roe v. Operation Rescue, 919 F.2d 857 (3d Cir. 1990) 12

Shillitani v. United States, 384 U.S. 364 (1966) 17

Thornburgh v. American College of Obst. & Gyn., 476 U.S. 747 (1986) 19

Union Tool Co. v. Wilson, 259 U.S. 107 (1922) 15, 16

United States v. Ayer, 866 F.2d 571 (2nd Cir. 1989) 19n

United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989) 15

United States v. Miller, 540 F.2d 1213 (4th Cir. 1976) 18n

United States v. North, 621 F.2d 1255 (3rd Cir.), *cert. denied sub nom. Eyler v. United States*, 449 U.S. 866 (1980) 18n

United States v. Spectro Foods Corp., 544 F.2d 1175 (3rd Cir. 1976) 18n

TABLE OF AUTHORITIES (cont'd)

CASES: Page(s)

Young v. U.S. ex rel. Vuitton Et Fils S.A.,
481 U.S. 787 (1987) 15

CONSTITUTION AND STATUTES:

U.S. Const. Amend. V 2

U.S. Const. Amend. XIV 3

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1985(3) 3, 20, 22, 26

42 U.S.C. § 1988 . . . . . 2, 23, 26

Fed. R. App. P. 35 21

Fed. R. App. P. 40 21

N.Y. Judiciary Law § 773 . . . . . 25n

N.Y. Penal Law § 240.20 . . . . . 15n

N.Y. Penal Law § 80.05(4) 15n

TABLE OF AUTHORITIES (cont'd)

Page(s)

MISCELLANEOUS:

Petitioner's Brief For Certiorari, *International Union, United Mine Workers v. Bagwell*, (No. 92-1625) 10, 11, 13

Transcript of Hearing on Contempt Motion (S.D.N.Y. July 28, 1989) 17n

Wright, Miller & Cooper, Federal Practice and Procedure: *Jurisdiction* 2d § 4515 (1982) 25n

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993
NO. ____

Reverend Robert Pearson, et al.,

Petitioners

v.

Planned Parenthood Margaret Sanger Clinic (Manhattan), et al.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DECISIONS BELOW

The three decisions of the district court resulting in two contempt judgments (Appendix H: A-89 to A-91 and Appendix E: A-38 to A-39) are reported in *New York State Nat'l Organization for Women v. Terry*, 732 F. Supp. 388 (S.D.N.Y. 1990) (Appendix I: A-92 to A-146), 737 F.Supp. 1350 (S.D.N.Y. 1990) (Appendix G: A-54 to A-88), and an unreported oral bench ruling which incorporates the first ruling (Appendix F: A-40 to A-53). The three underlying injunctive orders are included in the Appendix (A-147 to A-158). The

appeals from these judgments were consolidated in the court of appeals. The prior decision of the court of appeals was issued on April 13, 1992, and is reported at 961 F.2d 390 (2d Cir. 1992) (Appendix D: A-8 to A-37). On February 22, 1993, the prior decision of the court of appeals was vacated and remanded by this Court *sub. nom. Pearson v. Planned Parenthood Margaret Sanger Clinic (Manhattan)*, ___ U.S. ___, 113 S.Ct. 1233, 122 L.Ed.2d 640 (1993) (Appendix C: A-7). On July 2, 1993, in a brief *per curiam* decision the court of appeals reinstated its prior judgment without modification, which is reported at 996 F.2d 1351 (2d Cir. 1993) (Appendix B: A-3 to A-6). The Petitioners requested a rehearing en banc which was denied by the court of appeals on August 23, 1993 (Appendix A: A-1 to A-2).

JURISDICTION

The judgments of the United States District Court for the Southern District of New York were entered on May 8, 1990 and November 8, 1990. The consolidated appeals involving the contempt fines and the award of 42 U.S.C. § 1988 attorneys' fees on the main case in the United States Court of Appeals for the Second Circuit were decided on April 13, 1992. This Court vacated the decision of the court of appeals on February 22, 1993. The court of appeals reinstated its judgment without modification on July 2, 1993 and denied a petition for rehearing on August 23, 1993. This Court has jurisdiction, under 28 U.S.C. § 1254(1) to review the judgment of the United States Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution Amendment Five provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

U.S. Constitution Amendment Fourteen provides in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law.

42 U.S.C. § 1985(3) provides as follows:

> If two or more persons in any State or Territory conspire to go in disguise on the highway or on the premises of another, for the purposes of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purposes of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section; if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy,

> whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

Petitioners are eight individuals and two organizations, personally and morally opposed to abortion who, as participants in peaceful and non-violent public demonstrations, were made subject to severe and purportedly coercive civil contempt fines totalling $375,000 for alleged violations of the three injunctions.[1]

These phenomenally large fines levied against anti-establishment political protesters, for their participation in anti-abortion rescue demonstrations which have been found by the Second Circuit to be "a form of political speech,"[2] are a means of repressing civil protest that would have been enthusiastically endorsed by Bull Connor and the Jim Crow South.

Petitioners have repeatedly asserted throughout these proceedings that the huge unconditional contempt fines and

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[1] The district court issued three injunctions upon which the contempt fines and penalties are based: A temporary restraining order dated May 5, 1988 (Appendix L: A-155 to A-158), a preliminary injunction dated October 27, 1988 (Appendix K: A-151 to A-154), and a permanent injunction dated January 10, 1989 (Appendix J: A-147 to A-150).

[2] *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1363 (2d Cir. 1989), *cert denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed. 2d 532 (1990) (hereinafter "*Terry I*").

contempt attorneys' fees were criminal in nature, despite the lower courts' convenient label of "civil contempt penalties."

This Court is presently reviewing the identical issues in *International Union, United Mine Workers v. Bagwell*, No. 92-1625.

A. Course of Proceedings

The district court had earlier issued a permanent injunction (A-147 to A-150) in this action.[3] Subsequently, the private Respondents brought orders to show cause for summary judgment of contempt against the defendants and various non-party Petitioners for participating in Operation Rescue demonstrations on May 6, 1988, October 29, 1988, January 13, 1989 and January 14, 1989, in alleged violation of the temporary restraining order, preliminary injunction and permanent injunction.

The district court adjudged the Petitioners in contempt of its orders and levied fines purportedly for civil contempt totalling $375,000 and attorney's fees. The consolidated appeal of these huge fines and attorneys' fees was decided on April 13, 1992 by the court of appeals in *New York State Nat'l Organization for Women v. Terry*, 961 F.2d 390 (2d Cir. 1992) (hereinafter "*Terry II*") (Appendix D: A-8 to A-37).

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[3] *New York State Nat'l Org. for Women v. Terry*, 704 F. Supp. 1247 (S.D.N.Y. 1989) (granting a permanent injunction prohibiting the blocking of access to facilities that perform abortion), *aff'd as mod., New York State Nat'l Org. for Women v. Terry*, 886 F. 2d 1339 (2d Cir. 1989) *cert. denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed. 2d 532 (1990) (affirming the district court's various underlying injunctive orders in the original action as modified to provide that previous contempt fines against plaintiffs Terry and Operation Rescue were to be paid into the court, not to the plaintiff National Organization for Women) (*Terry I*).

On February 22, 1993, the 1992 decision and judgment of the United States Court of Appeals for the Second Circuit in *Terry II*, 961 F.2d 390 (2d Cir. 1992) (Appendix D: A-8 to A-37) was vacated and remanded by this Court *sub. nom. Pearson v. Planned Parenthood Margaret Sanger Clinic (Manhattan)*, ___ U.S. __, 113 S.Ct. 1233, 122 L.Ed.2d 640 (1993) (Appendix C: A-7) for further consideration in light of *Bray v. Alexandria Women's Health Clinic*, 506 U.S. ___, 113 S. Ct. 753, 122 L.Ed.2d 34 (1993) (hereinafter "*Bray*"), rendered on January 13, 1993.

In its 1993 *per curiam* decision,[4] which was rendered purportedly in obedience to this Court's remand for reconsideration in light of *Bray*, and after the parties had briefed this issue,[5] the court of appeals again reinstated its initial vacated judgment on this appeal, without modification, and without any discussion of *Bray*. Essentially ignoring this Court's *Bray* decision, the 1993 *per curiam* decision appealed herein inexplicably failed to vacate the section 1988 award of attorneys' fees as this Court did in *Bray*. The court below further failed to remand the issues in this action to the district court, failed to issue further instructions to the district court, and failed to vacate its prior affirmance of the judgment of contempt penalties against Petitioners.

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[4] *New York State Nat'l Org. for Women v. Terry*, 996 F.2d 1351, (2d Cir. 1993) (*per curiam*; before Kearse, Mahoney, and Snead, Circuit Judges), attached as Appendix B: A-3 to A-6.

[5] Pursuant to the court of appeals' request to the parties of May 25, 1993, Petitioners submitted on June 11, 1993 a nine-page letter brief to address the proper disposition of the case in light of *Bray*.

Petitioners moved for rehearing in banc on July 16, 1993, which the court of appeals denied on August 23, 1993 (Appendix A: A-1 to A-2).

B. Statement of Facts

The Petitioners in this case were defendants or non-parties whom the district court held in contempt and against whom $375,000 in contempt fines were assessed payable to the United States. *See*, Judgments at Appendices H, E (A-89 to A-91 and A-38 to A-39).

The district court found that the demonstrations in which the Petitioners participated had been organized by defendant Operation Rescue so that "protestors each day would converge on a facility at which abortions were performed in an effort to close down the facility [and] . . . their purpose was to 'block the doors so they cannot do abortions today'." 732 F. Supp. at 393 (A-95), 405 (A-126).

In the 1989 Second Circuit opinion, the circuit court recognized that the "defendants' actions clearly are a form of political speech protected by the First Amendment." *Terry I*, 886 F.2d at 1363. The Second Circuit clearly acknowledged that the purpose of Operation Rescue demonstrations was to communicate the message "that abortion is wrong, immoral and must be stopped." *Terry I*, 886 F.2d at 1363.

For participation in one or more Operation Rescue demonstrations on May 6, 1988, October 29, 1988, January 13, 1989 and January 14, 1989, in the New York City area, the district court levied what it termed coercive civil contempt penalties and fines against the political protestors as follows:

Petitioner	Alleged TRO, Prel. or Perm. Injunction Violations	Unconditional Fines*
Rev. Jesse Lee	3	$100,000
Joseph Foreman	2	$ 25,000
Michael McMonagle	1	$ 25,000
Jeff White	1	$ 25,000
Rev. Robert Pearson	1	$ 25,000
Christopher Slattery	2	$ 25,000**
B.O.R.N.	1	$ 25,000
Randall A. Terry	3	$100,000***
Thomas Herlihy	1	$ 25,000
		$375,000

* 732 F. Supp. at 413-414 (A-145); 961 F.2d at 394 (A-17). Fines were also assessed against non-Petitioners Florence Talluto ($50,000 for 2 violations), Michael LaPenna ($25,000 for 1 violation) and Adelle Nathanson ($25,000 for 1 violation), for a total of $450,000.00. Talluto and LaPenna's fines were vacated by the court of appeals for lack jurisdiction due to improper service of the contempt papers. 961 F.2d at 398-400 (A-25 to A-30). Nathanson discontinued her appeal. Attorneys' fees were also assessed against all contemnors by the district court and were upheld by the Second Circuit. 961 F.2d at 394-395 (A-17 to A-18).

** Slattery was fined $50,000, $25,000 of which was suspended.

*** Terry's and Operation Rescue's fines were joint and several.

It is these phenomenally large contempt penalties, and their attendant attorney's fees, that the Petitioners seek to have vacated by this Court.

REASONS FOR GRANTING THE WRIT

I. The Purportedly Civil Contempt Fines and Penalties Issued By The District Court Rest On The Identical Legal Grounds at Issue in a Case Presently Before This Court, *International Union, United Mine Workers of America, and United Mine Workers of America, District 28 v. John L. Bagwell, Clinchfield Coal Co., and The "B" Mining Co.*, No. 92-1625

A. Issues Concerning The Constitutional Distinction Between Civil Contempt and Criminal Contempt.

Currently pending before this Court is the case of *International Union, United Mine Workers of America, v. Bagwell, cert. granted*, ___ U.S. ___, (June 1, 1993) (No. 92-1625) (hereinafter "*Bagwell*"), which raises legal issues identical to those raised by Petitioners here.

In particular, Questions No. 1 in *Bagwell* is:

> In *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 443 (1911), this Court declared that, in the context of contempt proceedings, the "distinction between *refusing to do an act commanded* (remedied by imprisonment until the party performs the required act), and *doing an act forbidden*

> (punished by imprisonment for a definite term)" is a distinction that is "sound in principle, and generally, if not universally, afford[s] a test by which to determine the [civil or criminal] nature of the punishment." 221 U.S. at 443 (emphasis added). *See also, Hicks v. Feiock*, 485 U.S. 624 (1988) (reaffirming *Gompers* in context of contempt fines). Against this background, the first question presented here is:
>
> > Whether—as the Virginia Supreme Court held below, and as is the growing trend in the lower courts—a contempt proceeding may be treated as civil in nature (so that none of the constitutional requirements for a criminal contempt proceeding need be followed) where the defendant is charged with having taken certain completed actions that were *prohibited* by previously imposed judicial orders, and where a finding by the court that the defendant took such prohibited actions leads to the sentencing of the defendant to pay to the court (or the state) substantial fines (in fixed amounts not measured by any harm suffered by a civil party) that the court had established at the time of its initials orders?

Bagwell Pet. Cert. at i. The "Questions Presented" section of this Petition contains the identical first question presented in the *Bagwell* case.

In view of the excessive monetary penalties assessed against the Petitioners, this Court should *either grant* and consider this case with *Bagwell or hold* this Petition pending this Court's decision in *Bagwell*. If this Court answers this first question in the negative, as the *Bagwell* Petitioners urge, then

this Court can, without more, *either vacate and reverse* in their entirety the allegedly civil contempt judgments, fines and penalties assessed against the Petitioners in the case at bar *or vacate and remand* for further proceedings consistent with the *Bagwell* decision.

In the Petition for Certiorari in the *Bagwell* case at pages 17-18, the Union Petitioners specifically cite a dangerous line of cases arising out of anti-abortion demonstrations:

> A line of recent cases arising out of anti-abortion demonstrations is illustrative. For example, in *Aradia Women's Health Center v. Operation Rescue*, 929 F.2d 530 (9th Cir. 1991), the trial judge enjoined the defendants and any person acting in concert with the defendants "from blocking access to abortion facilities and other activities in the state," and "provided for sanctions of $500 for each prospective violation of the order," *id.* at 531. Defendants violated this order, and the trial judge held them in civil contempt.
>
> On appeal, the Ninth Circuit acknowledged this Court's instruction in *Hicks* that a contempt fine is civil "when the defendant can avoid paying the fine simply by performing the . . . *act required by the court's order,*" 929 F.2d at 532 (emphasis added). But the Ninth Circuit determined that defendants had "committed the *act* that subjected them to contempt by *failing to comply with the court's prospective order,*" *id.* at 532, and thus held that the trial judge had properly proceeded in civil contempt, *id.* Such verbal sleight of hand—through which a failure-to-comply with a

prohibition is somehow transmuted into the failure to do an affirmative act commanded—empties the mandatory/ prohibitory dichotomy of meaning and robs the *Gompers* test of its content.

Other lower court decisions have adopted the same stratagem. *See, e.g., Roe v. Operation Rescue*, 919 F.2d 857, 869 (3d Cir. 1990) *(trial judge appropriately enforced a prohibitory order in civil contempt because "the contemnors' obligation to pay these fines was contingent on a future violation of its orders"); N.Y. State National Organization for Women v. Terry, 886 F.2d 1339, 1351 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990) (trial judge appropriately enforced a prohibitory order in civil contempt because "[t]he prospectively fixed penalties were plainly intended to coerce compliance with the court's order and to preserve the parties' then-existing legal rights"); Lovejoy Specialty Hosp. v. Advocates for Life, Inc.*, 802 P.2d 684 (Or. App. 1990), *pet. rev. dismissed as moot*, 814 P.2d 511 (Or. 1991) (same).

In practical terms, this burgeoning rule—that, even where a prohibitory decree is being enforced, the contempt is civil if the surface form of the order imposing contempt sanctions is conditional—shrinks criminal contempt to the verge of invisibility. To avoid the inconvenience of meeting the Constitution's requirements for criminal cases, all that a judge need do is announce in advance that, if his decree is violated, he will impose a fine or a jail

> sentence. Doing so transforms all sanctions imposed for any subsequent disobedience into civil contempt sanction. The lower court's creation of this rule—which trivializes the Court's precedents and the important constitutional interest these precedents implement—calls for this Court's review.

Bagwell Pet. Cert. at 17-18 (footnote omitted; emphasis added).

The decision of the Supreme Court of Virginia, *Bagwell v. International Union, United Mine Workers of America*, 244 Va. 463, 423 S.E.2d 349 (1992), now under review by this Court on certiorari in *Bagwell*, relied on the same legal grounds as the appealed decision herein. The Supreme Court of Virginia held that the substantial fines imposed against the Union and its member were "valid, *coercive*, civil fines" and "not *compensatory* civil fines." 244 Va. at 477, 423 S.E.2d at 357 (emphasis added). The court continued:

> Furthermore, other courts share our view respecting the validity of employing a prospective, civil fine schedule to coerce defendants into future compliance with a court's prohibitory injunction. *See, e.g., New York State Nat. Organization For Women v. Terry*, 886 F.2d 1339, 1351 (2d Cir. 1989), *cert. denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d 532 (1990); *Aradia Women's Health Center v. Operation Rescue*, 929 F.2d 530, 532-33 (9th Cir. 1991); *Clark v. International Union, UMWA*, 752 F. Supp. 1291, 1297 (W.D. Va. 1990).

Id., 423 S.E.2d at 357-58 (footnote omitted).

The identical issue was addressed in the 1992 *Terry II* decision of the court of appeals in this case which was vacated by this Court:

> [Appellants] argue that the contempt fines imposed by the district court were criminal rather than civil, in nature, and that appellants were not accorded procedural protections required in criminal contempt proceedings; we ruled to the contrary in *Terry I*. *See id.* at 1350-51. These issues are therefore settled in this circuit, absent reconsideration in banc or a different ruling by the Supreme Court. *See, e.g. Leecan v. Lopes*, 893 F.2d 1434, 1443 (2d Cir.), *cert. denied*, ___ U.S. ___, 110 S. Ct. 2627, 110 L.Ed.2d 647 (1990).

961 F.2d at 396 (A-20). Thus this Court's decision in *Bagwell* on the same issue will be controlling with respect to the appealed 1993 Second Circuit *per curiam* decision which reinstated *Terry II*, as it squarely controls the issue that *Terry II* refused to reexamine, *i.e.*, whether the contempt fines in that case were criminal in nature and thus were imposed without affording Petitioners due process.

The fact that the lower courts have conveniently denominated their penalty civil coercive contempt is not controlling and should not be allowed to defeat applicable protections of federal constitutional law. *Hicks v. Feiock*, 485 U.S. 624, 631 (1988). The unconditional and punitive character of the court's contempt proceeding orders made the contempt criminal. *Hicks v. Feiock, supra*, 485 U.S. at 632-633. So did their irrational severity, 100 times the criminal fine for the same

offense in the absence of any damage to Respondents.[6] *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 1901-1904, 104 L.Ed.2d. 487 (1989). Since none of the due process protections, required in criminal proceedings, were afforded Petitioners, the contempt judgments must be reversed. *Young v. U.S. ex rel. Vuitton Et Fils S.A.*, 481 U.S. 787, 798-99 (1987). *See, Penfield Co. of California v. Securities & Exchange Commission*, 330 U.S. 585, 592-595 (1947) (an unconditional $50.00 fine was a criminal sanction); *Union Tool Co. v. Wilson*, 259 U.S. 107, 110 (1922) (a $2,500 fine payable to the court was a criminal sanction); *Nye v. United States*, 313 U.S. 33, 34 (1941) (unconditional fines payable to the United States carry the criminal hallmark); *Hicks v. Feiock, supra.*

The criminal nature of the contempt judgments is further revealed by their punitive quality (to vindicate the authority of the court), and not as "remedial, and for the benefit of the complainant." *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911). *In re Christensen Engineering Co.*, 194 U.S. 458, 24 S. Ct. 729, 48 L.Ed. 1072 (1904), involved the defendant's appeal of a $1,000.00 contempt fine in a patent suit for "disobedience of a preliminary injunction . . . . The fine was payable, one half to the United States and the other half to the complainant." 194 U.S. at 459. In explaining the criminal nature of the fine, this Court said:

> These authorities show that when an order imposing a fine for violation of an injunction is substantially one to reimburse the party injured

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[6] The private Respondents during the contempt proceeding in the court below submitted arrest lists of some of the individual Petitioners, which lists show that they were charged with disorderly conduct, a violation, which carries a maximum fine of $250.00. *See*, New York Penal Law §§ 240.20 and 80.05(4). *See also People v. McDaniel*, 154 Misc. 2d 89, 593 N.Y.S.2d 154 (App. Term), *appeal denied*, 81 N.Y.2d 889, 613 N.E.2d 982 (1992).

> by the disobedience, although called one in a contempt proceeding, it is to be regarded as merely an interlocutory order, and to be reviewed only on appeal from the final decree.
>
> In the present case, however, the fine payable to the United States was clearly punitive and in vindication of the authority of the court, and, we think, as such, it dominates the proceeding, and fixes its character. 194 U.S. at 460, 461.

In *In re Merchants' Stock & Grain Co.*, 223 U.S. 639, 32 S. Ct. 339, 56 L.Ed. 584 (1912), contempt fines totalling $3,500, imposed for disobedience of a preliminary injunction, payable 75% to the plaintiff and 25% to the United States, were held to be criminal in nature, relying on *Christensen Engineering, supra.*

Citing both *Christensen Engineering* and *Merchants Stock & Grain*, Justice Brandeis, in *Union Tool Co. v. Wilson*, explained that:

> Where a fine is imposed partly as compensation to the complainant and partly as punishment, the criminal feature of the order is dominant and fixes its character for purposes of review.

259 U.S. 107, 110 (1922). The instant contempt fines totalling $375,000, are not even a mixture of compensatory and punitive, but are payable solely to the United States. They are not compensatory; they are punitive and as such, criminal in nature.

The fact that the Second Circuit in its prior *Terry I* opinion, 886 F.2d 1339, modified the November 3, 1988, $50,000 Contempt Judgment, to be payable to the court (the United States) and not to the private Respondent N.O.W.,

reveals that the present contempt fines are clearly punitive in nature and not remedial and for the benefit of the complainant. Moreover, the fines are clearly "intended as a deterrent to offenses against the public"[7] and "to punish the act of disobedience as a public wrong."[8]

Regarding unconditional versus conditional sanctions, this Court has often stated that a civil contempt sanction must have a mechanism whereby the contemnor can subsequently comply with the court's order and thereby purge himself of the contempt. *See, Shillitani v. United States*, 384 U.S. 364, 371 (1966); *Hicks v. Feiock, supra*; *Penfield v. Securities & Exchange Commission, supra*; *Doyle v. London Guarantee & Acci. Co.*, 204 U.S. 599, 51 L.Ed. 641, 644 (1907) ("compliance with the order relieves from payment."). When unconditional contempt fines were entered against the Petitioners, there was nothing the Petitioners could have done to purge themselves of the contempt.[9] The judgments were therefore, *ipso facto*, criminal in nature.

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7 *Nye, supra*, 313 U.S. at 42.

8 *Michaelson v. United States*, 266 U.S. 42, 65 (1924).

9 The issue of the opportunity to purge was raised by counsel for Petitioners at the hearing on motion for summary judgment for contempt fines before Judge Ward in the district court. Transcript of Hearing (S.D.N.Y. July 28, 1989), at 46-49, 53-55, 90-94, 119, 126-127. The court refused requests to make the fines conditional on future conduct – thereby allowing Petitioners to purge themselves of contempt – holding that the fines were civil and not criminal. *Id.* at 127-128. In a subsequent hearing as to Petitioner Slattery, the court imposed a fine of $50,000, which was unconditional in part, and $25,000 of which was suspended and conditioned upon future conduct. *See* Appendix F (A-51).

The Second Circuit's 1992 *Terry II* decision (961 F.2d at 395 (A-12)) which reaffirmed its prior ruling in *Terry I* (886 F.2d at 1350-1351) that the Petitioners' opportunity to comply with the order came *before* a violation occurred only manifests the invalidity of the Second Circuit's reasoning and suggests that due process is truly turned on its head when pro-life demonstrators are in the dock. The purge mechanism doctrine comes into play *after* a party is adjudged in contempt, so that the sanction is imposed with *conditions* which allow the contemnor to escape the sanction by compliance with the order. This case involves, however, violations of orders to refrain from prohibited action which cannot be purged; the only appropriate response of a court is to punish past conduct, which is classic criminal contempt.[10]

These conditionality and purge mechanism requirements for civil contempt have been followed by other circuit courts,[11]

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[10] *See also, Crozer-Chester Medical Center v. Moran*, 522 Pa. 124, 560 A.2d 133 (Pa. 1989) (contempt against anti-abortion protester adjudged to be criminal).

[11] *Douglass v. First National Realty Corp.*, 543 F.2d 894 (D.C. Cir. 1976); *United States v. Miller*, 540 F.2d 1213 (4th Cir. 1976); *United States v. Spectro Foods Corp.*, 544 F.2d 1175 (3rd Cir. 1976); *United States v. North*, 621 F.2d 1255 (3rd Cir.), *cert. denied, sub. nom. Eyler v. United States*, 449 U.S. 866 (1980); *In re Stewart*, 571 F.2d 958 (5th Cir. 1978); *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770 (9th Cir. 1983).

as well as other Second Circuit decisions.[12] Apparently then, the only reason they were not applied here is the grim reality that in cases involving abortion rights, "a permissible reading of the [law] is to be avoided at all costs." *Thornburgh v. American College of Obst. & Gyn.*, 476 U.S. 747, 812 (1986) (White, J., dissenting).

II. This Court's Vacate and Remand Order in *Pearson* Requires The Court of Appeals to, at Minimum, Vacate its Judgment and Remand With Instructions to the District Court to Enter Judgment For Petitioners on the Federal Claims, Especially an Order to Vacate The Section 1988 Attorneys' Fees Award of Over $150,000. The Second Circuit's Refusal to Amend its Judgment in Light of *Bray*, Despite This Court's Mandate, Was Erroneous.

This Court has previously granted certiorari in this case *sub. nom Pearson v. Planned Parenthood Margaret Sanger Clinic (Manhattan)*, __ U.S. __, 113 S.Ct. 1233, 122 L.Ed.2d 640 (1993) (Appendix C: A-7) (hereinafter "*Pearson*"). In *Pearson*, this Court vacated the judgment of the court of appeals in *Terry II*, 961 F.2d 390 (2d Cir. 1992) (Appendix D: A-8 to A-37) and remanded for further consideration in light of *Bray v.*

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[12] *In re Grand Jury Witness*, 835 F.2d 437, 442 (2d Cir. 1987) *cert. denied sub nom. Arambulo v. United States*, 485 U.S. 1039 (1988) (stating a $50,000 fine was clearly criminal contempt); *United States v. Ayer*, 866 F.2d 571 (2nd Cir. 1989) (determinate sentence vacated because of absence of purge mechanism); *Hess v. New Jersey Transit Rail Operations, Inc.*, 846 F.2d 114 (2d Cir. 1988) (unconditional fine vacated).

Alexandria Women's Health Clinic, 506 U.S. __, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993).

In *Bray*, this Court rejected the application of 42 U.S.C. § 1985(3) to Operation Rescue sit-ins and blockades of abortion businesses and further vacated the *Bray* respondents' section 1988 award of attorney's fees.

Upon remand from *Pearson*, the court below did not vacate the section 1988 award of over $150,000 in attorneys' fees in this case, but rather reinstated its prior vacated judgment without modification in a *per curiam* decision. (Appendix B: A-3 to A-6).

This Court must intervene to correct the court of appeals refusal to follow this Court's mandate in *Pearson*.

The court of appeals' *per curiam* opinion of July 2, 1993, which merely reinstated its initial judgment, is in direct defiance of this Court's mandate in *Pearson* to apply *Bray*, in that it (1) fails to give controlling effect to this Court's decision interpreting the scope of 42 U.S.C. § 1985(3) to exclude application to blockades of abortion clinics by pro-life demonstrators who oppose abortion – a scenario virtually identical to that presented herein; (2) fails to recognize that the cause of action under § 1985(3) is lacking in merit on and after the date *Bray* was decided; and (3) most importantly fails to follow the relief mandated in *Bray*, *i.e.*, reversal of the merits of the § 1985(3) claim and reversal of the award of attorney's fees and costs thereunder of over $150,000, which this Court in *Bray* specifically ordered with respect to the parties in that case. 122 L.Ed.2d at 56-57.

The rule of law announced in *Bray* is required to be given full retroactive effect in this case, even as to those matters adjudicated in *Terry I*. In *Harper v. Virginia Dept. of Taxation*,

___ U.S. ___, 113 S. Ct. 2510, 2517 (June 18, 1993), the Court held that when the U.S. Supreme Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given *full retroactive effect* in *all cases* still open on direct review and as to *all events*, regardless of whether such events predate or postdate the announcement of the rule. Thus, it is clear that *Bray* must be given full retroactive effect as to all issues in this case.

The court of appeals erred in its failure to apply the precedent of *Bray* to its prior determination in *Terry II*, and in refusing to correct this error on rehearing. *See*, Fed. R. App. P. 35 and 40. By reinstating its prior *Terry II* judgment, the court of appeals has ignored the clear mandate in *Pearson* and has placed itself squarely at odds with this Court's ruling in *Bray* and *Pearson*.

In its 1993 *per curiam* decision, the Second Circuit reasoned that application for relief in light of *Bray* should be addressed in the first instance to the district court. While Petitioners are not unmindful of the court's directive, by *reinstating* its prior judgment, the court of appeals has in effect entered a *final* judgment in the case as to the contempt fines, contempt attorneys' fees and section 1988 attorneys' fees on the main case, thereby rendering any application to the district court futile.

The *Bray* case presented virtually the same legal issues and arose out of a factual situation so analogous that it is virtually indistinguishable from the present case. Indeed, the lower court upon reconsideration made no attempt to distinguish *Bray*. Furthermore, the Fourth Circuit decision, *National Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990) (*per curiam*), vacated and reversed in part by this Court in *Bray*, explicitly relied on the Second Circuit's earlier decision in these proceedings, *Terry I*, 886 F.2d 1339 (2d. Cir.

1989), *cert. denied*, 495 U.S. 947, 110 S. Ct. 2206, 109 L.Ed.2d 532 (1990), finding the case controlling. 914 F.2d at 585. Therefore, *Bray*'s holding, that the "Ku Klux Klan Act," 42 U.S.C. § 1985(3), does not provide a cause of action against anti-abortion advocates for obstructing access to abortion businesses, is controlling and warrants dismissal of all federal claims in the instant case as well as vacature of the section 1988 award of attorneys' fees to the Respondents.

The 1993 *per curiam* decision reinstated its judgment in *Terry II* without any modification (Appendix B: A-3 to A-7). However, the *Terry II* holding that 42 U.S.C. § 1985(3) provides a cause of action for obstructing access to abortion businesses, was premised upon three articulated bases: (1) that women seeking abortions constitute a valid "class of persons" for purposes of 42 U.S.C. § 1985(3); (2) that Petitioners' actions directed at the prevention of abortions amounted to a "class-based animus" required for a violation of section 1985(3); and (3) that Petitioners' actions violated the constitutional right to travel of persons seeking abortions. *Terry II*, 961 F.2d at 395 (A-19, 20). *See, Terry I*, 886 F.2d at 1358-61; *New York State Nat'l Organization for Women v. Terry*, 704 F. Supp. 1247, 1258-59 (S.D.N.Y. 1989). *These rulings have been unambiguously rejected in Bray.*

It is therefore clear that in light of *Bray* there is no basis upon which it could be argued that the court of appeals' prior *Terry II* judgment affirming the district court on the merits of Respondents' § 1985 claims and its award of § 1988 attorneys' fees, should have been reinstated following this Court's remand in *Pearson*. Indeed, *Bray* itself recognizes that any § 1985(3) claim with respect to similar facts after the date of the *Bray* decision cannot be maintained, and would be frivolous:

> Petitioners . . . contend that Respondents' § 1985(3) claims were so insubstantial that the

> District Court lacked subject-matter jurisdiction over the action, including the pendant state claims . . . While Respondents' § 1985(3) causes of action fail, they were not, *prior to our deciding of this case*, "wholly insubstantial and frivolous," *Bell v. Hood*, 327 U.S. 678, 682-683, 90 L.Ed. 939, 66 S.Ct. 773, 13 A.L.R.2d 383 (1946), so as to deprive the District Court of jurisdiction.

Bray, 122 L.Ed.2d at 56 (emphasis added).

Thus, *Bray* conclusively disposes of the federal claims under § 1985 in this case, and the appropriate remedy under *Bray* requires the court of appeals to reverse its judgment and remand with instructions to the lower court to dismiss with prejudice all § 1985 claims against Petitioners.[13] Since reasonable attorney's fees are allowed in the court's discretion under 42 U.S.C. § 1988 *only* to the "prevailing party" in a § 1985 action, the court of appeals was also required to vacate the award of attorney's fees and costs with respect to any litigation of the federal claims. *See, Bray*, 122 L.Ed.2d at 56. *See also, New York State Nat'l Organization for Women v. Terry*, 737 F. Supp. 1350, 1357-67 (S.D.N.Y. 1990) (Appendix G: A-63 - A-84) (district court specifically held that it was awarding contempt attorney fees under section 1988).

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[13] Petitioners respectfully submit that the Second Circuit should have been guided by the example of the Fourth Circuit, on remand from this Court in *Bray*, which remanded the case to the district court "[i]n obedience to the Supreme Court's mandate" for further proceedings consistent with that Court's opinion, and without reinstating its prior judgment which *Bray* vacated. *Nat'l Org. for Women v. Operation Rescue*, No. 90-985 (4th Cir. filed Feb. 11, 1993).

Bray, a case of first impression in the United States Supreme Court, which adjudicated issues of great interest and importance to many segments of American society, is a decision of exceptional importance, and its proper application in the Second Circuit is likewise a matter of significant importance. In a broader perspective, the proper implementation of newly announced rules of law by the High Court is at stake. Petitioners submit that the court of appeals' reinstatement of its prior decision and judgment in *Terry II* after *Bray* is insupportable and places the Second Circuit conflict with the

clear mandate of this Court in *Pearson*.[14] Therefore this Court should grant certiorari and apply *Bray* to the instant case in light of the lower court's failure to do so.

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[14] Assuming, arguendo, that this Court determines in *Bagwell* that the contempt fines and attorneys' fees assessed against Petitioners do not implicate constitutional due process, then *Bray* nonetheless would require that the court's judgments in *Terry II*, if premised solely on the state law claims of trespass and public nuisance, conform to the substantive law of the State of New York under the doctrine first articulated in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). *See*, Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4515 (1982). *See also*, *Bray*, 122 L.Ed.2d at 56-57.

As Petitioners have argued in the court of appeals, in light of the dismissal of the federal claims by *Bray*, any injunctive relief, contempt fines and contempt attorneys fees should conform to New York State Judiciary Law § 773 which is controlling as to both the amount of fines and attorneys' fees in actions for contempt of court's orders when said orders are deemed to rest on state law claims alone. Where it is not shown that actual loss or injury has been caused, "a fine may be imposed, not to exceed the amount of the complainant's costs and expenses, and two hundred fifty dollars in addition thereto . . ." McKinney's N.Y. Judiciary Law § 773 (1992). As noted by the court of appeals in *Terry I*, no damages have been proved in this case. 886 F.2d 1339, 1353. Therefore, even if *Bagwell* is found distinguishable, the judgment should still be amended to conform to substantive state law.

Contrary to the *per curiam* opinion of July 2, 1993, Petitioners do not seek remand of the matter to *state* court, but rather suggested remand to the district court with instructions to reconsider the contempt judgments under substantive law of the State of New York, as was required by the *Bray* decision, assuming that the court of appeals did not vacate and dismiss the contempt awards of its own volition in the first instance.

CONCLUSION

For the foregoing reasons and those of the *Bagwell* Petitioners and their Amici Curiae supporters, the Petitioners pray that this Petition be granted and that the contempt judgments assessing $375,000 in fines with their attendant attorneys' fees, against the defendants and non-party Petitioners be *either vacated and reversed* in their entirety *or vacated and remanded* for further proceedings consistent with this Court's decision in *Bagwell*.

Petitioners further pray that this Court *remand* with instructions to the court of appeals to *vacate* the award of attorneys fees under 42 U.S.C. § 1988 associated with any litigation of the federal claims under 42 U.S.C. § 1985(3), against the defendants Petitioners, pursuant to this Court's previous mandate in *Pearson*.

Dated: New Milford, CT.
November 19, 1993

Respectfully submitted,

MICHAEL P. TIERNEY
A. LAWRENCE WASHBURN, JR.
KARIN M. BURKE
Legal Center for Defense of Life
210 East 23rd Street, Suite 5F
New York, NY 10010
(212) 685-1360

JOSEPH P. SECOLA
(Counsel of Record)
McCarthy & Secola
P.O. Box 1108
8 South Main Street
New Milford, CT 06776
(203) 355-0923

WILLIAM P. HARRINGTON
Bleakley Platt & Schmidt
One North Lexington Avenue
P.O. Box 5056
White Plains, NY 10602
(914) 949-2700

JOHN F. SWEENEY
GABRIEL P. KRALIK
Morgan & Finnegan
345 Park Avenue
New York, NY 10154
(212) 758-4800
Attorneys for Petitioners

APPENDICES

Appendix A:	Denial of Petition For Rehearing and Suggestion For Rehearing En Banc by U.S. Court of Appeals for the Second Circuit, August 23, 1993, *New York State Nat'l Organization for Women v. Terry,* (unpublished)	A - 1
Appendix B:	*Per Curiam* Opinion of the U.S. Court of Appeals for the Second Circuit on Remand from the U.S. Supreme Court, July 2, 1993, *New York State Nat'l Organization for Women v. Terry,* 996 F.2d. 1351 (2d Cir. 1993).	A - 3
Appendix C:	Opinion of the U.S. Supreme Court, February 22, 1993, *Pearson v. Planned Parenthood Margaret Sanger Clinic (Manhattan),* 113 S.Ct. 1233, 122 L.Ed.2d 640 (No. 92-282)	A - 7
Appendix D:	Opinion of U.S. Court of Appeals for the Second Circuit, April 13, 1992, *New York State Nat'l Organization for Women v. Terry,* 961 F.2d 390 (2d Cir. 1992)	A - 8

Appendix E:	Order assessing contempt fines against Petitioner Christopher Slattery, November 8, 1990	A - 38
Appendix F:	Oral Bench Ruling of the U.S. District Court for the Southern District of New York, November 8, 1990	A - 40
Appendix G:	Opinion of U.S. District Court for the Southern District of New York, May 31, 1990, *New York State Nat'l Organization for Women v. Terry*, 737 F. Supp. 1350 (S.D.N.Y. 1990)	A - 54
Appendix H:	Order assessing contempt fines against Petitioners, May 8, 1990	A - 89
Appendix I:	Opinion of U.S. District Court for the Southern District of New York, February 27, 1990, *New York State Nat'l Organization for Women v. Terry*, 732 F. Supp. 388 (S.D.N.Y. 1990)	A - 92
Appendix J:	Permanent Injunction dated January 10, 1989	A - 147
Appendix K:	Preliminary Injunction dated October 27, 1988	A - 151

Appendix L: Temporary Restraining Order dated May 5, 1988 A - 155

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23rd day of August one thousand nine hundred and ninety-three.

NEW YORK STATE NOW, ET. AL.,

v.

TERRY, ET. AL.

DOCKET NUMBER: 90-6187

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by defendants-appellants Randall A. Terry, Operation Rescue and Thomas Herlihy and Respondents-appellants Reverend Robert Pearson, Reverend Jesse Lee, Joseph Foreman, Michael McMonagle, Jeff White, Bistate Operation Rescue Network (B.O.R.N.) and Christopher Slattery,

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active services and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

SO ORDERED:

FOR THE COURT,
Elaine B. Goldsmith, Clerk
By: /s/ KATHY BROUWER
Kathy Brouwer, Operations Mgr.
8-23-93
(Date)

APPENDIX B

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN; New York City Chapter of the National Organization for Women; National Organization for Women; Religious Coalition for Abortion Rights - New York Metropolitan Area; New York State National Abortion Rights Action League; Planned Parenthood of New York City, Inc.; Eastern Women's Center Inc.; Planned Parenthood Clinic (Bronx); Planned Parenthood Clinic (Brooklyn); Planned Parenthood Margaret Sanger Clinic (Manhattan); Ob-Gyn Pavilion; The Center For Reproductive and Sexual Health; VIP Medical Associates; Bill Baird Institute (Suffolk); Bill Baird Institute (Nassau); Dr. Thomas J. Mullin; Bill Baird; Reverend Beatrice Blair; Rabbi Dennis Math; Reverend Donald Morlan; Pro-Choice Coalition, Plaintiffs-Appellees,

and

The City of New York, Intervenor-Appellee,

and

United States of America,
Creditor-Appellee,

v.

Randall A. TERRY; Operation Rescue; Reverend James P. Lisante; Thomas Herlihy; John Doe(s); Jane Doe(s), the last two being fictitious NAMES, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants

who are engaging in, or intend to engage in, the conduct complained of herein, Defendants,

Randall A. Terry; Operation Rescue; and Thomas Herlihy, Defendants-Appellants,

Bernard Nathanson, Respondent,

Jesse Lee; Joseph Foreman; Michael McMonagle; Jeff White; Florence Talluto; Michael LaPenna; Adelle Nathanson; Reverend Robert Pearson; BiState Operation Rescue Network; and Christopher Slattery, Respondents-Appellants,

A. Lawrence Washburn, Jr., Counsel-Appellant.

No. 1427, 1552 and 1553, Dockets 90-6187, 91-6011 and 91-6029.

United States Court of Appeals, Second Circuit

Argued May 20, 1991.

Decided April 13, 1992.

Vacated March 29, 1993.

Reinstated July 2, 1993.

The judgment entered pursuant to our initial opinion on this appeal, *see* 961 F.2d 390 (2d Cir. 1992), was vacated

by the Supreme Court and remanded for reconsideration in light of *Bray v. Alexandria Women's Health Clinic*, ___ U.S. ___, 113 S. Ct. 753, 122 L.Ed.2d 34 (1993). We reinstate the judgment.

William P. Harrington, White Plains, New York, A. Lawrence Washburn, Jr., New York City (Bleakley, Platt & Schmidt, White Plains, New York, Michael P. Tierney, Karin M. Burke, Legal Center for Defense of Life, New York City, and Joseph P. Secola, McCarthy & Secola, New Milford, Connecticut, of counsel), for Defendants-Appellants and Respondents-Appellants.

David Cole, Washington, D.C., Ruth Jones, Deborah Ellis, New York City (Center for Constitutional Rights, Washington, D.C., NOW Legal Defense & Education Fund, New York City, of counsel), for Plaintiffs-Appellees.

Hillary Weisman, Asst. Corp. Counsel for the City of New York, New York City (O. Peter Sherwood, Corp. Counsel for the City of New York, of counsel), for Intervenor-Appellee.

Before: KEARSE, MAHONEY and SNEED,* Circuit Judges.

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* The Honorable Joseph T. Sneed, Judge of the United States Circuit Court for the Ninth Circuit, sitting by designation.

PER CURIAM:[*]

We initially decided this appeal in *New York State National Organization for Women v. Terry*, 961 F.2d 390 (2d Cir. 1992). The Supreme Court granted certiorari *sub. nom Pearson v. Planned Parenthood Margaret Sanger Clinic*, and vacated and remanded for further consideration in light of *Bray v. Alexandria Women's Health Clinic*, ____ U.S. ____, 113 S. Ct. 753, 122 L.Ed.2d 34 (1993). *Pearson*, ____ U.S. ____, 113 S. Ct. 1233, 122 L.Ed.2d 640 (1993). We then directed the submission of letter briefs by the parties regarding the proper disposition upon remand.

We now reinstate the initial judgment in this appeal entered pursuant to our prior opinion. Applications for such relief in light of *Bray* as dismissal of the federal claims, a remand of the action to state court, or reconsideration of the contempt sanctions litigated on this appeal should be addressed in the first instance to the district court.

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[*] Decision reported at 996 F.2d 1351 (2d Cir. 1993).

APPENDIX C

Robert PEARSON, et al., petitioners, v. PLANNED PARENTHOOD MARGARET SANGER CLINIC (MANHATTAN,) et al.

No. 92-282.

Case below, *N.Y. State Nat. Org. for Women v. Terry*, 732 F.Supp. 388; 737 F.Supp. 1350; 961 F.2d 390.

Feb. 22, 1993.* On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Bray v. Alexandria Women's Health Clinic*, 506 U.S. _____, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993).

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* Decision reported at 113 S.Ct. 1223, 122 L.Ed.2d 640 (Feb. 22, 1993).

APPENDIX D

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN; New York City Chapter of the National Organization for Women; National Organization for Women; Religious Coalition for Abortion Rights-New York Metropoli-tan Area; New York State National Abortion Rights Action League; Planned Parenthood of New York City, Inc.; Eastern Women's Center, Inc.; Planned Parenthood Clinic (Bronx); Planned Parenthood Clinic (Brooklyn); Planned Parenthood Margaret Sanger Clinic (Manhattan); OB-GYN Pavilion; The Center for Reproductive and Sexual Health; VIP Medical Associates; Bill Baird Institute (Suffolk); Bill Baird Institute (Nassau); Dr. Thomas J. Mullin; Bill Baird; Reverend Beatrice Blair; Rabbi Dennis Math; Reverend Donald Morlan; and Pro-Choice Coalition, Plaintiffs-Appellees,

and

The City of New York, Intervenor-Appellee,

and

United States of America
Creditor-Appelee,

v.

Randall A. TERRY; Operation Rescue; Reverend James P. Lisante; Thomas Herlihy; John Doe(s); Jane Doe(s), the last two being fictitious Names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein, Defendants,

Randall A. Terry; Operation Rescue; and Thomas Herlihy, Defendants-Appellants,

Jesse Lee; Joseph Foreman; Michael McMonagle; Jeff White; Florence Talluto; Michael LaPenna; Adelle Nathanson; Reverend Robert Pearson; Bistate Operation Rescue Network; and Christopher Slattery, Respondents-Appellants,

A. Lawrence Washburn, Jr. Counsel-Appellant.

Nos. 1427, 1552, 1553, Dockets 90-6187, 91-6011, 91-6029.

United States Court of Appeals, Second Circuit.

Argued May 20, 1991.

Decided April 13, 1992.

[392][1] Joseph P. Secola, New Milford, Conn. (A Lawrence Washburn, Jr., New York City, of counsel), for defendants-appellants, respondents-appellants (other than Christopher Slattery), and counsel-appellant.

Mary M. Gundrum, Center for Constitutional Rights, New York City (Alison Wetherfield, Ruth Jones, NOW Legal Defense & Education Fund, of counsel), for plaintiffs-appellees.

William P. Harrington, White Plains, N.Y. (Bleakley, Platt & Schmidt, of counsel), for respondent-appellant Christopher Slattery.

Gail P. Rubin, Asst. Corp. Counsel of the City of New York, New York City (Victor A. Kovner, Corp. Counsel of the City of New York, of counsel), for intervenor-appellee City of New York.

Nancy Kilson, Asst. U.S. Atty. for the Southern District of New York, New York City (Otto G. Obermaier, U.S. Atty. for the Southern District of New York, of counsel), for creditor-appellee U.S.

Before KEARSE, MAHONEY, and SNEED,* Circuit Judges.

MAHONEY, Circuit Judge:

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[1] Bracketed numbers indicate page numbers from decision reported at 961 F.2d 390 (2d Cir. 1992).

* The Honorable Joseph T. Sneed, Judge of the United States District Court for the Ninth Circuit, sitting by designation.

Defendants-appellants and respondents-appellants (other than Christopher Slattery) appeal[1] from an order entered May 10, 1990, and a final amended order entered July 9, 1990, of the United States District Court for the Southern District of New York, Robert J. Ward, Judge, that (1) adjudged them in civil contempt of orders and a permanent injunction previously entered by that court, (2) assessed contempt penalties against them in amounts ranging from $25,000 to $100,000, and (3) assessed attorneys' fees and costs against them in amounts ranging from $3,190.02 to $157,505.81. Respondent-appellant Christopher Slattery

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[1] The appeals are complicated by various filings of notices of appeals followed by several vacaturs and reinstatements. After a careful review of the record, however, we are persuaded that all defendants-appellants and respondents-appellants, and counsel-appellant, are properly before us, except that respondent-appellant Bistate Operation Rescue Network has not perfected an appeal from the judgment entered against it on July 9, 1990 for $3,190.02 in attorneys' fees. We note that appeals have been noticed, presumably by inadvertence, on behalf of defendant Reverend James P. Lisante, against whom no order or judgment was entered, and respondent Bernard Nathanson, against whom no order or judgment was entered and whom the district court explicitly found not to have committed any civil contempt. *See* 732 F.Supp. at 406-07, 414. We note also that plaintiffs-appellees assert in their brief that respondent-appellant Adelle Nathanson has not taken an appeal, without contradiction by defendants-appellants and respondents-appellants in their reply brief or at oral argument. The record appears to indicate, however, that after stipulating to withdraw her then-pending appeal on January 24, 1991, respondent-appellant Adelle Nathanson filed a fresh notice of appeal on January 25, 1991.

appeals[2] from an order and judgment [393] of that court entered December 26, 1990 that adjudged him in contempt of a preliminary injunction and a permanent injunction previously entered by that court, assessed a $50,000 contempt penalty against him, and stayed execution of judgment as to $25,000 on condition that Slattery commit no further violations of the injunctions. Counsel-appellant A. Lawrence Washburn, Jr. appeals from an amended final order of that court entered July 9, 1990 that assessed a sanction against him, pursuant to Fed.R.Civ.P. 11, in the amount of $11,712.47.

The appealed rulings are premised upon two published opinions, *New York State National Organization for Women v. Terry*, 732 F.Supp. 388 (S.D.N.Y. 1990) and *New York State National Organization for Women v. Terry*, , 737 F.Supp. 1350 (S.D.N.Y. 1990), and (as to respondent-appellant Christopher Slattery) an unpublished oral bench decision.

We reverse as to respondents-appellants Florence Talluto and Michael LaPenna and counsel-appellant; we otherwise affirm.

Background

Plaintiffs-appellees are organizations that favor legalized abortion, health clinics that perform abortions, a doctor who performs abortions, and three religious leaders. Defendants-appellants are three individuals Randall A. Terry,

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[2] The court's oral decision as to respondent-appellant Christopher Slattery was rendered November 8, 1990. He filed a notice of appeal on December 6, 1990, and the former order and judgment against him was entered December 26, 1990. His appeal is validated by Fed.R.App.P. 4(a)(2).

Reverend James P. Lisante, and Thomas Herlihy, and an organization, Operation Rescue, opposed to legalized abortion. Plaintiffs also "named as defendants 'John Does' and 'Jane Does,' intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of." *New York State Nat'l Org. for Women v. Terry*, 697 F.Supp. 1324, 1327 n. 2 (S.D.N.Y. 1988). That conduct is the prevention of access to facilities in the New York City Area performing abortions.

In *New York State National Organization for Women v. Terry*, 886 F.2d 1339, 1357-64 (2d Cir. 1989), *cert. denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d 532 (1990) (*"Terry I"*), we affirmed a permanent injunction entered by the district court on January 10, 1989 against defendants' efforts to block access to abortion clinics in certain New York State counties because we concluded that those attempts violated 42 U.S.C. § 1985(3) (1988), as well as state trespass and public nuisance law. (The injunction provides for prospective civil contempt penalties of $25,000 per day for its violation, and each successive violation results in doubling of the sanction applicable to the contemnor. *See New York State Nat'l Org. for Women v. Terry*, 704 F.Supp. 1247, 1263-64 (S.D.N.Y. 1989)). We also affirmed an earlier ruling entered October 27, 1988, *see New York State Nat'l Org. for Women v. Terry*, 697 F.Supp. 1324 (S.D.N.Y. 1988), in which the district court held, *inter alia*, that: (1) defendants Terry and Operation Rescue were in contempt of that court's May 4

temporary injunction,[3] which also provided for $25,000 per day sanctions, and imposed contempt sanctions of $25,000 against each of them; and (2) discovery sanctions pursuant to Fed.R.Civ.P. 37(a)(4) would be imposed against defendants. *See Terry I*, 886 F.2d at 1350-57. We modified the district court's ruling, however, by directing that the contempt sanctions be paid to the court, rather than to plaintiff-appellee New York State National Organization for Women ("N.O.W."), which had provided "no evidence of actual injury [to N.O.W.] due to Operation Rescue's activities." 886 F.2d at 1354.

The district court's October 27, 1988 contempt ruling was "without prejudice to plaintiffs' right to proceed against defendants Herlihy and Lisante, or against any other individuals who violated the Court's Order with notice." *New York State Nat'l Org. for Women v. Terry*, 697 F.Supp. at 1338. Plaintiffs have since initiated contempt proceedings against various alleged participants in Operation Rescue's activities. *See New York State Nat'l Org. for Women* [394] *v. Terry*, 732 F.Supp. at 392-93. The demonstrators against whom plaintiffs sought contempt sanctions are the following organizations and persons: defendants-appellants Operation Rescue, Terry and Herlihy; respondent Bernard Nathanson; and respondents-appellants Bistate Operation Rescue Network ("B.O.R.N."), Jesse Lee, Joseph Foreman, Michael McMonagle, Jeff White, Florence Talluto, Michael LaPenna, Adelle Nathanson, Reverend Robert Pearson, and Christopher Slattery. *See id.* at 396 & n. 2.

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[3] *See* 697 F.Supp. at 1328. This injunction, adopted by the district court, was originally issued by the New York State Supreme Court, from which its action was removed. *See id.*

Plaintiffs-appellees' contempt application relates to four days of demonstrations at various facilities performing abortions: May 6, 1988, October 29, 1988, January 13, 1989, and January 14, 1989. *See id.* at 398. On all these dates, Operation Rescue members held demonstrations at which they blocked access to abortion facilities. *See id.* at 394-95. At the May 6, 1988 demonstration, the terms of the May 4, 1988 temporary injunction were read aloud by the New York City police before arrests began. *See id.* at 394. Similarly, on January 13 and 14, 1989, police officers read the applicable permanent injunction to the demonstrators before initiating arrests. *See id.* at 395.

The district court found, with respect to defendants-appellants, that "all of the demonstrations at issue in these contempt proceedings were initiated and coordinated by Operation Rescue," *id.* at 389-99; Terry led the demonstrations, engaging in "purposeful conduct designed to violate the Court's orders," *id.* at 399; and Herliy participated in the May 6 demonstration with notice of the district court's order against him. *See id.* The district court: (1) adjudged Terry and Operation Rescue to be in civil contempt of its October 27, 1988 order and permanent injunction , and assessed penalties in the amount of $100,000 against each of them; and (2) adjudged Herlihy to be in civil contempt of its May 4, 1988 order, and assessed a penalty in the amount of $25,000 against him. *See id.* at 413.

Contempt penalties were also assessed against respondents-appellants on the basis that "civil contempt sanctions may be assessed against nonparties who had actual notice of the [court's] orders in effect at the time in question and participated with defendants in violating those orders." *Id.* at 399-400. *See* Fed.R.Civ.P. 65(d) (order granting

injunction "is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise"). After addressing and rejecting most of the respondents' arguments against the imposition of contempt sanctions, *see* 732 F.Supp. at 399-409, the district court found respondents-appellants in contempt of various of the court's orders and assessed contempt penalties against them, as set

forth in the margin.[4] The district court further ruled that: "Each of the contemnors is liable to plaintiffs for a pro rata share of the attorneys' fees and [395] costs incurred by plaintiffs as a result of bringing the contempt motion against him or her." 732 F.Supp. at 414. Finally, the district court granted plaintiffs-appellees' motion for the imposition of a

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[4] The district court ruled as follows.

> Respondent B.O.R.N. is adjudged in civil contempt of this Court's October 27 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Lee is adjudged in civil contempt of the Court's May 4 Order, October 27 Order and Permanent Injunction and assessed coercive civil penalties in the amount of $100,000. Respondent Foreman is adjudged in civil contempt of the Court's May 4, Order and Permanent Injunction and assessed coercive civil penalties in the amount of $25,000. Respondents McMonagle and White are adjudged in civil contempt of the Court's Permanent Injunction and assessed coercive civil penalties in the amount of $25,000. Respondent LaPenna is adjudged in civil contempt of the Court's May 4 Order and October 27 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Talluto is adjudged in civil contempt of the Court's October 27 Order and Permanent Injunction and assessed coercive civil penalties in the amount of $50,000. Respondent Adelle Nathanson is adjudged in civil contempt of the Court's October 27 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Pearson is adjudged in civil contempt of the Court's Permanent Injunction and assessed coercive civil penalties in the amount of $25,000. Respondent Bernard Nathanson is not adjudged in civil contempt.
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> 732 F.Supp. at 413-14. As to respondent-appellant Christopher Slattery, *see supra* note 2 and accompanying text.

Rule 11 sanction upon attorney A. Lawrence Washburn, concluding that "Washburn is liable to plaintiffs for the attorneys' fees and costs they incurred as a result of filing their motion for sanctions and responding to his renewed cross-motion to dismiss." *Id.*

Subsequent to these rulings, the district court issued another opinion addressing plaintiffs' applications for attorney's fees and costs incurred as a result of: (1) litigating the main action,[5] (2) bringing the contempt proceedings, and (3) Washburn's violation of Rule 11. *See New York State Nat'l Org. for Women v. Terry*, 737 F.Supp. 1350 (S.D.N.Y. 1990). The district court granted all these applications, but reduced the dollar amounts from those sought by plaintiffs-appellees (except as to the Rule 11 sanction against Washburn, which application was granted in full). *See id.* at 1358-67. Defendants-appellants were adjudged liable for attorneys fees and costs pursuant to section 1988 in the amount of $157,505.81; contemnors (including defendants-appellants) were assessed fees and costs in the total amount of $83,000.69. Rule 11 sanctions were assessed against Washburn in the amount of $11,712.47. *See id.* at 1367.

This appeal followed. *See supra* notes 1 and 2.

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[5] These fees were requested pursuant to 42 U.S.C. § 1988 (1988), which provides in pertinent part that:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fees as part of the costs.

Discussion

A. *The Merits of Terry I.*

Appellants devote the bulk of their appeal to a reargument of issues that this court decided in *Terry I.* They contend that women are not a valid "class of persons" for purposes of 42 U.S.C. § 1985(3);[6] we held to the contrary in *Terry I. See* 886 F.2d at 1358-59. They argue that even if women are a valid class, appellants' actions directed at the prevention of abortions did not amount to the class-based animus required for a violation of section 1985(3); we ruled to

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[6] Section 1985(3) provides in pertinent part:

> If two or more persons in any State ... conspire ... for the purposes of depriving, either directly or indirectly, *any person or class of persons* of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State ... from giving or securing to all peroses within such state ... the equal protection of the laws; ... in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Id. (emphasis added).

the contrary in *Terry I*. *See id.* at 1359-60. They argue that they did not violate any constitutional right to travel of persons seeking abortions; we held to the contrary in *Terry I*. *See id.* at 1360-61. They argue that the contempt fines imposed by the district court were criminal, rather than civil, in nature, and that appellants were not accorded procedural protections required in criminal contempt proceedings; we ruled to the contrary in *Terry I*. *See id.* at 1350-51. These issues are therefore settled in this circuit, absent reconsiderations in banc or a different ruling by the Supreme Court. *See, e.g. Leecan v. Lopes*, 893 F.2d 1434, 1443 (2d Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 2627, 110 L.Ed.2d 647 (1990).

[1] In addition, our determination in *Terry I* constitute the law of the case. This doctrine requires that we "adhere[] 'to [our] own decision at an earlier stage of the litigation' unless there are 'cogent or **[396]** 'compelling' reasons not to, such as 'an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" *Sanders v. Sullivan*, 900 F.2d 601, 605 (2d Cir. 1990) (quoting *Doe v. New York City Dep't of Social Servs.*, 709 F.2d 782, 789 (2d Cir.), *cert. denied*, 464 U.S. 864, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983)). No such reason is presented here, at least at this juncture in the litigation.

We note in this regard that the Supreme Court has granted certiorari and heard oral argument in *National Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990) (per curiam), *cert. granted sub nom. Bray v. Alexandria Women's Health Clinic*, ____ U.S. ___, 111 S.Ct. 1070, 112 L.Ed.2d 1176 (1991). In that case, the Fourth Circuit explicitly invoked *Terry I* for the proposition that "blocking access to medical services provided by abortion

facilities which serve an interstate clientele violates the constitutional right to travel." 914 F.2d at 585. Even if the Supreme Court were to reverse the Fourth Circuit in *Bray*, however, it is unlikely that appellants could benefit form that ruling in this case.

The underlying injunctive orders pursuant to which contempt proceedings were brought against appellants were premised not only upon section 1985(3) but also upon the independent state law grounds of trespass and public nuisance. *See Terry I*, 886 F.2d at 1361-62. (It is noteworthy in this regard that plaintiffs-appellees initiated this action in state court, and defendants-appellants removed it to federal court. *See supra* note 3.) Accordingly, the district court's actions can be sustained on these state grounds, which have not been separately challenged on this appeal, so long as the federal claim asserted by plaintiffs-appellees "ha[s] substance sufficient to confer subject matter jurisdiction on the court." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966) (citing *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 53 S.Ct. 549, 77 L.Ed. 1062 (1933)); *see Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218, 228 (6th Cir. 1991) (remanding for consideration whether injunction improperly premised upon alleged violation of section 1985(3) should be reinstated on state grounds of trespass, nuisance, or tortious interference with business); *Roe v. Operation Rescue*, 919 F.2d 857, 867-68 (3d Cir. 1990) (affirming injunction on unchallenged state grounds of trespass and intentional interference with contractual relations without addressing merits of section 1985(3) claim upon which injunction was also based).

Thus, only a federal claim that is "'so attenuated and unsubstantial as to be absolutely devoid of merit'" would preclude the district court's exercise of jurisdiction over the state trespass and public nuisance claims presented here. *Hagans v. Lavine*, 415 U.S. 528, 536-37, 94 S.Ct. 1372, 1378-79, 39 L.Ed.2d 577 (1974) (quoting *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 579, 24 S.Ct., 553, 557, 48 L.Ed. 795 (1904)). Given our ruling in *Terry I*, and the general state of the law on this issue, *see National Org. for Women v. Operation Rescue*, 914 F.2d at 585 (collecting cases), it appears clear that plaintiffs-appellees have asserted a substantial federal claim adequate to ground jurisdiction over the state trespass and public nuisance claims. This conclusion is subject, however, to the caveat that the petition for certiorari in *Bray v. Alexandria Women's Health Clinic* poses for review, *inter alia*, the question: "Are respondents' claims under 42 U.S.C. 1985(3) so insubstantial as to deprive federal courts of subject matter jurisdiction?", 59 U.S.L.W. 3508 (U.S. Jan 21, 1991) (No. 90-985), and the grant of certiorari in *Bray* was not qualified regarding the questions to be considered by the Supreme Court. *See* ___ U.S. ___, 111 S.Ct. 1070, 112 L.Ed.2d 1176 (1991).

B. *Contentions of Respondents-Appellants Not Foreclosed by Terry I.*

Respondents-appellants, who were not parties to *Terry I*, have presented a number of arguments that are not foreclosed by *Terry I*, which we now address.

[397] 1. *Asserted Failure to Comply with Fed.R.Civ.P. 4(j).*

[2] Rule 43(a) of the Civil Rules of the United States District Court for the Southern District of New York

provides that a "proceeding to adjudicate a person in civil contempt of court ... shall be commenced by the service of a notice of motion or order to show cause." Where the alleged contemnor has not yet appeared in the action, "service shall be made personally, in the manner provided for by the Federal Rules of Civil Procedure for the service of a summons." Id.

Respondents-appellants, upon whom service of orders to show cause was made as required by Rule 43(a), contend that they should be regarded as the unknown John Doe(s) and Mary Doe(s) named in plaintiffs-appellees' complaint, *see* Fed.R.Civ.P. 10(a); i.e., as defendants "presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein." They accordingly claim status as *defendants, rather than respondents*, in this case.

It follows, they argue, that service of the orders to show cause was required to comply with Fed.R.Civ.P. 4(j), which provides in pertinent part:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party of whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to the defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

Because they were not served with the orders to show cause "within 120 days after the filing of the complaint," or (as they alternatively contend in their reply brief) within 120 days of the demonstrations for which they were adjudged in contempt, respondents-appellants contend that plaintiffs-appellees "must begin their entire injunction case afresh against the Respondents, not having served them in time to participate in the case against the four known defendants."

Respondents-appellants cite *Napier v. Thirty or More Unidentified Federal Agents, Employees or Officers*, 855 F.2d 1080 (3d Cir. 1988), and *Rankel v. Greenburgh*, 117 F.R.D. 50 (S.D.N.Y. 1987), in support of this position, but these cases are not on point. *Napier's* only mention of rule 4(j) was in relation to the improper service of named, not fictitious, parties. *See* 855 F.2d at 1088 n. 4. Similarly, *Rankel* involved a motion to dismiss a named, not fictitious, party, and that motion was denied. *See* 117 F.R.D. at 54-55 & n 6.

We agree with the district court that "it is absurd to suggest that plaintiffs are forced to do the impossible: foretell which individuals will subsequently act in concert with defendants in violation of an injunctive order of the Court and serve them within 120 days of filing the complaint." *New York State Nat'l Org. for Women V. Terry*, 732 F.Supp. at 403 We conclude that the time constraints of Rule 4(j) do not apply to service in connection with a contempt proceeding arising out of violation of injunctions validly issued pursuant to Fed.R.Civ.P. 65(d). We next address respondents-appellants' claim that the injunctive orders in this case were not so issued.

2. *Compliance with Fed.R.Civ.P. 65(d).*

[3] Respondents-appellants further contend that they were not "in active concert or participation" with defendants, as required by Rule 65(d), because their actions "were independently motivated" by their "political, social and moral positions on the subject of ... abortion." We have no reason to doubt this representation, but it is unavailing as an escape hatch from Rule 65(d). The rule is directed to the actuality of concert or participation, without regard to the motives that prompt the concert or participation.

[4,5] Respondents-appellants also contend that the district court's injunctions [398] failed to "set forth the reasons for [their] issuance" and, because some of the defendants were fictitiously named, were not "specific in terms" and did not "describe in reasonable detail ... the act or acts sought to be restrained," all as required by Rule 65(d). We disagree. The requirement of a statement of reasons "applies to the order granting the relief and does not require that the injunction itself set forth the reasons why the court granted the order." 11 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2955 at 539 (1973). Here, the district court issued an extensive opinion that set forth the reasons for the injunctions. *See New York State Nat'l Org. for Women v. Terry*, 704 F.Supp. at 1257-64. As to respondents-appellants' other contention, the naming of fictitious defendants did not render the injunctions insufficiently precise because respondents-appellants had fair notice that acting in concert with the named defendants would subject them to contempt proceedings.

3. *Service upon Talluto and LaPenna.*

As noted earlier, Southern District Civil Rule 43(a) required that the order to show cause for the contempt motion

be served upon respondents-appellants "personally, in the manner provided for by the Federal Rules of Civil Procedure for the service of a summons." Respondents-appellants Florence Talluto and Michael LaPenna contend that service upon them did not comply with this mandate.

The district court's order to show cause provided that if "plaintiffs are unable to effect personal service after two attempts, they may serve respondents at their last known address by Federal Express." *New York State Nat'l Org. for Women v. Terry*, 732 F.Supp. at 400. Respondents were so served.[7] The district court concluded that its order allowing such service was proper under Fed.R.Civ.P. 4(c)(2)(C)(i), which allows service upon individuals "pursuant to the law of the state in which the district court is held." *See New York State Nat'l Org. for Women v. Terry*, 732 F.Supp. at 400-01.

The pertinent law is N.Y.Civ.Prac.L. & R. 308 (McKinney 1990). The district court concluded that service was proper under paragraph 5 of § 308, which permits personal service upon a natural person "in such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one [personal service], two

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[7] Respondent-appellant Adelle Nathanson was also served in this manner, but no argument on this issue is advanced in her behalf on appeal. *See supra* note 1. The district court found that she had waived any objection to service, invoking Fed.R.Civ.P. 12(b)(5). *See New York State Nat'l Org. for Women v. Terry*, 732 F.Supp. at 400 n. 6.

['leave and mail' service[8]] and four ['nail and mail' service[9]] of this section." *Id.* § 308(5). The issue then, is whether personal, leave and mail, and nail and mail service were all "impracticable." *See Dobkin v. Chapman*, 21 N.Y.2d 490, 497-99, 236 N.E.2d 451, 455-56, 289 N.Y.S.2d 161, 167-68 (1968); *Dime Savings Bank of New York, FSB v. Mancini*, 169 A.D.2d 964, 964-65, 564 N.Y.S.2d 859, 859-60 (3d Dep't 1991); *Hitchcock v. Pyramid Centers of Empire State Co.*, 151 A.D.2d 837, 838-39, 542 N.Y.S.2d 813, 814-15 (3d Dep't 1989); *Giordano v. McMurtry*, 79 A.D.2d 548, 548-49, 433 N.Y.S.2d 583, 584 (1st Dep't 1980), *aff'd mem.*, 53 N.Y.2d 962, 424 N.E.2d 555, 441 N.Y.S.2d 668 (1981).

[399] LaPenna and Talluto argue that nail and mail was practicable. The district court disagreed, emphasizing that "those who have glagrantly violated the court's orders are

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[8] "Leave and mail" refers to:

> delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and ... either mailing the summons to the person to be served at his or her last known residence or ... mailing the summons by first class mail to the person to be served at his or her actual place of business.

Id. § 308(2).

[9] "Nail and mail" refers to:

> affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and ... either mailing the summons to such person at his or her last known residence or ... mailing the summons by first class mail to the person to be served at his or her actual place of business.

Id. § 308(4).

not disposed to make themselves readily available for personal delivery of notice that they are to be prosecuted for contempt of those orders." *New York State Nat'l Org. for Women v. Terry*, 732 F.Supp. at 401 (quoting *Department of Housing Preservation & Dev. v. 24 West 132 Equities, Inc.*, 137 Misc.2d 459, 462, 524 N.Y.S.2d 324, 327 (App. Term 1st Dep't 1987), *aff'd mem.*, 150 A.D.2d 181, 540 N.Y.S.2d 711 (1st Dep't 1989), *appeal dismissed*, 74 N.Y. 2d 841, 545 N.E. 2d 872, 546 N.Y.S.2d 558 (1989), *cert. denied*, 493 U.S. 1078, 110 S.Ct. 1130, 107 L.Ed.2d 1035 (1990)). The district court thought that *Department of Housing* "suggested that the manner of service is sufficient if it is 'reasonably calculated under all the circumstances to apprise respondents of the pendency of the action.'" *New York State Nat'l Org. for Women v. Terry*, 732 F.Supp. at 401 (quoting *Department of Housing*, 137 Misc.2d at 462, 524 N.Y.S.2d at 327), and concluded that the service here was so calculated. *Id.*

We read *Department of Housing* differently. The "reasonably calculated" formulation stated by Appellate Term was addressed to the due process standard under the United States Constitution. This is made clear by the Appellate Term's citation, immediately following the quoted passage, of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950), where it is stated that:

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action...." In *Department of Housing*, the contemnor was served by leave and mail, *see* 137 Misc.2d at 461, 524 N.Y.S.2d at 326, and the court emphasized that respondent had been served in accordance with "one of the methods delineated in [section

308]." *Id.* at 462, 524 N.Y.S.2d at 327. Accordingly, the service in *Department of Housing* complied with the constitutional standard *and* with section 308.

[6] In this case, by contrast, there was concededly no compliance with paragraphs 1, 2, and 4 of section 308, so the issue becomes the impracticability standard of paragraph 5. The district court found impracticability because plaintiffs presented evidence of the "practical difficulties" they would encounter in effectuating service "because of respondents' demonstrated disregard for the authority of the Court." *New York State Nat'l Org. for Women v. Terry*, 732 F.Supp. 401. This does not amount to a showing, however, that nail and mail service would not have been practicable.

As noted earlier, the district court's order to show cause allowed service by Federal Express at a respondent's "last known address" after two successful attempts at personal service. *See id.* at 400. Plaintiffs-appellees provided Federal Express with the names and last known addresses of LaPenna and Talluto. No reason appears why this information would not have sufficed for compliance with section 308(4); i.e., a mailing to the "last known residence" of LaPenna and Talluto, and affixation of the documents to the door of each's "actual place of business, dwelling place or usual place of abode." *Id.* The order to show cause did not require any showing that there was any confusion as to the residence or dwelling place of any respondent-appellant, i.e., any impracticability, before allowing a bypass of section 308(4).

[7] It was claimed at oral argument that the bulky motion papers involved could not practically have been "nailed" to any door, but section 308 requires only that they be "affix[ed]," and this may "be accomplished by use of a

nail, tack, tape, rubber band or some other device which will ensure a genuine adherence." *Pacamore Bearings, Inc. v. Foley*, 92 A.D.2d 959, 960, 460 N.Y.S.2d 662, 664 (3d Dep't 1983). We conclude that, in the absence of any showing, or requirement of a showing, that nail and mail service was impracticable, service under section 308(5) should not have been authorized by the district court.

[400] *See Dobkin*, 21 N.Y.2d at 497-99, 236 N.E.2d at 455-56, 289 N.Y.S.2d at 167-68; *Dime Savings Bank*, 169 A.D.2d at 964-65, 564 N.Y.S.2d at 859-60; *Hitchcock*, 151 A.D.2d at 838-39, 542 N.Y.S.2d at 814-15; *Giordano*, 79 A.D.2d at 548-49, 433 N.Y.S.2d at 584.

[8] When service is made pursuant to Fed.R.Civ.P. 4(c)(2)(C)(i), federal courts have no authority to stray from the requirements set by state law, here section 308, even if service in disregard of those requirements would still be constitutional. "[S]ervice of process must comply not only with constitutional requirements, but also with the provisions of the state statute." *FDIC v. Schaffer*, 731 F.2d 1134, 1136 (4th Cir. 1984). Numerous federal courts have refused to exercise jurisdiction over parties who were not served in accordance with the pertinent state statute. *See, e.g., Recreational Properties, Inc. v. Southwest Mortgage Serv. Corp.*, 804 F.2d 311, 314-15 (5th Cir. 1986); *Delta S.S. Lines, Inc. v. Albano*, 768 F.2d 728, 730 (5th Cir. 1985); *National Trust for Historic Preservation v. 1750 K Inv. Partnership*, 100 F.R.D. 483, 485-86 (E.D. Va. 1984), *aff'd mem.*, 755 F.2d 927, 929 (4th Cir. 1985); *Sun Sys. Prefabricated Solar Greenhouses, Inc. v. Venuti*, 596 F.Supp. 1516, 1517 (E.D.N.Y. 1984). Similarly, we conclude that the district court lacked jurisdiction over Talluto and LaPenna.

4. *The Rule 11 Sanction against Washburn.*

[9] The district court imposed a Rule 11 sanction upon counsel-appellant A. Lawrence Washburn, Jr. because he sought to renew a motion that asserted: (1) lack of subject matter jurisdiction over the underlying claims raised by plaintiffs in this action, (2) lack of subject matter jurisdiction because of the pending appeals[,] and (3) improper service of the Order to Show Cause under Rules 4(c)(2)(C)(i) and (ii). *New York State Nat'l Org. for Women v. Terry*, 732 F.Supp. at 409. The court concluded that resubmission of the motion amounted to "vexations conduct, which unduly delayed the adjudication of the contempt proceedings." *Id.* at 412.

The court previously invited renewal of the motion, which had originally been submitted upon inadequate papers, but cautioned that "in the event the motion is renewed *and denied as frivolous*, the Court would entertain a motion by plaintiffs for appropriate sanctions." *New York State Nat'l Org. for Women v. Terry*, 732 F.Supp. at 410 (emphasis added).

One of the grounds asserted in the motion has been determined on appeal not only to be nonfrivolous, but meritorious, resulting in reversal of the district court's ruling as to service upon Talluto and LaPenna. Thus, in view of the terms of the district court's invitation to resubmit the motion, it would be unfair and inappropriate to sanction Washburn for having done so, and we accordingly reverse the judgment imposing a Rule 11 sanction upon Washburn. *See Securities Indus. Ass'n v. Clarke*, 898 F.2d 318, 321-22 (2d Cir. 1990); *Motown Prods., Inc. v. Cacomm, Inc.*, 849 F.2d 781, 785-86 (2d Cir. 1988) (per curiam).

This result is consistent with our recent ruling in *Virgin Atl. Airways, Ltd. v. National Mediation Bd.*, 956 F.2d 1245, 1254-55 (2d Cir. 1992). In that case, we decided that it was not an abuse of discretion for the district court to impose Rule 11 sanctions upon a party that brought a motion (ultimately vindicated by our decision on appeal as meritorious) which was barred at that juncture in the district court by the law of the case doctrine, and also untimely under a local rule. Here, by contrast, Judge Ward invited resubmission of a motion that had not originally been presented on proper papers, and was thus initially denied without prejudice, but warned against an ultimate determination that the motion was frivolous. The ensuing determination of frivolousness, and the accompanying sanction, cannot survive a ruling on appeal that a key ground of the motion was not only nonfrivolous, but in fact a correct statement of the pertinent law.

[401] Conclusion

We reverse the judgments against respondents-appellants Florence Talluto and Michael LaPenna, and counsel-appellant A. Lawrence Washburn, Jr.; we affirm the judgments of the district court in all other respects.

SNEED, Senior Circuit Judge,
Concurring Separately:

I concur in the court's reversal of the district court's orders directed at respondents-appellants Talluto, LaPenna, and counsel-appellant. I concur in Part A of Judge Mahoney's opinion solely because of the compelling force of the law of this circuit as set forth in *New York State National Organization for Women v. Terry*, 886 F.2d 1339 (2d Cir.

1989), *cert. denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d 532 (1990) (*"Terry I"*).

KEARSE, Circuit Judge, concurring and dissenting:

With all due respect, I dissent from so much of the majority opinion as reverses the district court's imposition of sanctions on defendants' attorney A. Lawrence Washburn, Jr. pursuant to Fed.R.Civ.P.11 for a frivolous motion for reargument. The basis of the reversal, *i.e.*, that the district court erred in deciding the underlying merits of one of the issues as to which reargument was sought, is contrary to our recent decision in *Virgin Atlantic Airways, Ltd. v. National Mediation Board*, 956 F.2d 1245 (2d Cir. 1992) (*"Virgin Atlantic"*). Further, even if that were a permissible basis for reversal of a sanctions award, there were two other indisputably sound bases for the district court's imposition of sanctions, making it inappropriate for us to do more than vacate the imposition sanctions and remand to permit the district court to reconsider the matter of sanctions in light of our decision.

A. *The Service-of-Process Issue*

The motion that prompted the imposition of sanctions was threefold. It sought reargument of the district court's contempt order on the grounds of "(1) lack of subject matter jurisdiction over the underlying claims raised by plaintiffs in this action, (2) lack of subject matter jurisdiction because of the pending appeals[,] and (3) improper service of the Order to Show Cause under Rules 4(c)(2)(C)(i) and (ii).'" (Majority Opinion *ante* at 396). As to the third item, improper service, the fact that we have reversed the court's original decision

does not mean that the sanctions award with respect to reargument must be reversed.

The imposition of Rule 11 sanctions is to be reviewed under an abuse-of-discretion standard. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S.Ct. 2447, 2461, 110 L.Ed.2d 359 (1990). In *Virgin Atlantic*, we held that though the court had erred on the merits of a certain question, it nonetheless had discretion to impose sanctions against a federal agency for an attempt to reargue the question on the sole basis of intervening decisions of a district court in another circuit. We recognized that the district court had imposed sanctions for the agency's attempt to reargue a decided issue on the basis of insufficient new support, "not ... for the substance of its motion." *Virgin Atlantic* at 1255.

In the present case, despite the district court's repeated admonitions that Washburn's motion required the presentation of supporting affidavits and that frivolous filings could warrant sanctions, the motion to reargue lacked even the pretense of any new ammunition. (*See* Respondent's Memorandum Dated August 30, 1989, at 3: "[n]o new facts or affidavits are submitted and no new legal arguments are advanced".) Though the majority states that the district court "invited" the renewed motion, plainly the court did not invite it to be made on precisely the same papers as those on which it had just been denied. The district court's sanctions opinion, *New York State National Organization for Women v. Terry*, 732 F.Supp. 388 (S.D.N.Y. 1990) ("District Court Sanctions Opinion"), described the sequence. After rejecting counsel's original oral motion to dismiss on the grounds of improper service, "[t]he Court advised Washburn to submit a [402] motion in proper form, with supporting affidavits, if he wished to move to dismiss or quash service on behalf of respondents." *Id.* at

410. Counsel then submitted the motion in writing, but again without affidavits. In denying the written motion "without prejudice," "[t]he Court explained that the motion, as it was addressed to the issue of service, was inadequate in its present form, as there were no affidavits by any of respondents concerning service." Id. In connection with this explanation and again in granting an extension of time, the court cautioned that Rule 11 sanctions might be imposed if a renewed motion were frivolous. Nonetheless, in connection with Washburn's renewal of the written motion,

> "[n]o notice of motion was filed, nor were any supporting affidavits attached, despite the directive of the Court and the requirements of Civil Rule 3. No new arguments were advanced in the memorandum, with the exception of a section arguing that attorneys possess immunity from sanctions for their conduct, in a judicial proceeding and, therefore, that Rule 11 sanctions cannot be imposed upon them.

Id. Thus the court concluded that "[w]hile the Court does not impose sanctions lightly, an objective analysis of Washburn's conduct in resubmitting the motion without affidavits or additional support, and in substantially the same manner as it had been when previously denied by the Court, leads only to the conclusion that Washburn violated Rule 11." *Id.* at 412. On Washburn's motion to vacate the Rule 11 sanctions, the court stated that the "sanctions were not imposed for the filing of the original cross-motion, but only for the resubmission of the cross-motion without additional support." *New York State National Organization for Women v. Terry*, 737 F.Supp. 1350, 1366 (S.D.N.Y. 1990).

On this record, it is difficult for me to reconcile the majority's reversal of the imposition of sanctions against

Washburn with either the abuse-of-discretion standard of review established by the Supreme Court in *Cooter & Gell* or with our Court's decision in *Virgin Atlantic*.

B. *The Other Reargument Grounds that Elicited Sanctions*

Even if reversal on the merits of the original motion were a basis for reversing an award of sanctions for a repetitive attempt to reargue, in the present case the sanctions order should not be reversed outright because it was based on two additional reargruments by Washburn on which defendants have not prevailed on appeal. First, Washburn renewed the argument that the court lacked subject matter jurisdiction of the action. As a matter of principle, since that question was then pending on appeal, the district court could not revise it. Second, he argued that the district court did not have the power to hold defendants in contempt because defendants had appealed from the entry of the injunction whose terms they had flouted. In light of the fact that defendants had twice tried, once in the district court and once in this Court, to obtain a stay of the injunction and had twice been denied, defendant's renewed challenged to the court's power to hold them in contempt - like counsel's assertion that attorneys are immune from sanctions for frivolous court filings -was frivolous. Thus, on these two issues, the district court stated that "[t]he arguments advanced by Washburn were each previously rejected by the Court and, with the exception of the challenge to the manner of service ..., were each manifestly frivolous. When an attorney submits, or resubmits, a motion that he knew, or should have known, was meritless, Rule 11 sanctions are appropriate." District Court Sanctions Opinion, 732 F.Supp. at 412.

Imposition of sanctions on account of these frivolous challenges to the court's jurisdiction plainly was not an abuse of discretion. Accordingly, even if *Virgin Atlantic* did not exist as precedent, the most this Court could properly do is remand for the district court's consideration of whether to exercise its discretion to impose sanctions on these two bases alone, in light of the reversal on the merits of the service issue.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN, et al.,

Plaintiffs,

88 Civ. 3071

CITY OF NEW YORK,

(R.J.W.)

Plaintiff-Intervenor,

-against-

RANDALL TERRY, et al.,

Defendants.

ORDER

Plaintiffs' Order to Show Cause, filed July 14, 1989, why respondent Christopher Slattery should not be held in contempt of this Court's Order granting a preliminary injunction, issued on October 27, 1988, and fined coercive civil sanctions for his actions of October 29, 1988 in Dobbs Ferry, New York, and why he should not be held in contempt of this Court's Order granting a permanent injunction, issued on January 10, 1989, and fined coercive civil sanctions for his actions of January 14, 1989 in New York, New York, having come on for hearing before the Court on November 7 and 8, 1990, the Honorable Robert J. Ward presiding, and the issues

having been duly heard, and a decision having been rendered on November 8, 1990,

IT IS ORDERED AND ADJUDGED that respondent Christopher Slattery is fined coercive civil sanctions in the sum of $25,000, for his violation on January 14, 1989 of this Court's permanent injunction of January 10, 1989, which sum shall be paid forthwith into the Treasury of the United States.

IT IS FURTHER ORDERED AND ADJUDGED that respondent Slattery is fined coercive civil sanctions in the sum of $25,000 for his violation on October 29, 1988 of this Court's preliminary injunction of October 27, 1988, with regards to which $25,000, execution of judgment is stayed on condition that respondent will not violate the aforementioned orders at any time in the future.

IT IS FURTHER ORDERED AND ADJUDGED that in the event the Court finds a future violation of these orders, the Court would be prepared to vacate the stay of execution with respect to that portion of the judgment which imposes a $25,000 fine with respect to the events of October 29, 1988, in addition to imposing such further sanctions as would be independently warranted for any such future violations.

/s/ ROBERT J. WARD
Robert J. Ward

UNITED STATES DISTRICT JUDGE

Dated: New York, New York
November 8, 1990

APPENDIX F

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN; New York City Chapter of the National Organization for Women; National Organization for Women; Religious Coalition for Abortion Rights-New York Metropoli-tan Area; New York State National Abortion Rights Action League, Inc.; Planned Parenthood of New York City, Inc.; Eastern Women's Center, Inc.; Planned Parenthood Clinic (Bronx); Planned Parenthood Clinic (Brooklyn); Planned Parenthood Margaret Sanger Clinic (Manhattan); OB-GYN Pavilion; the Center for Reproductive and Sexual Health; VIP Medical Associates; Bill Baird Institute (Suffolk); Bill Baird Institute (Nassau); Dr. Thomas J. Mullin; Bill Baird; Reverend Beatrice Blair; Rabbi Dennis Math; Reverend Donald Morlan; and Pro-Choice Coalition. Plaintiffs,

and

City of New York, Plaintiff-Intervenor,

v.

Randall TERRY; Operation Rescue; Reverend James P. Lisante; Thomas Herlihy; John Doe(s) and Jane Doe(s), the last two being fictitious Names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants

who are engaging in, or intend to engage in, the conduct complained of herein, Defendants.

No. 88 Civ. 3071 (RJW).
United States District Court,
S.D. New York.
November 8, 1990

[207][1] THE COURT: What I had in mind to do, because obviously there are a number of matters which may well be the subject of an appeal, would be to incorporate by reference the court's determination of February 27, 1990 which then would permit the parties, not only Mr. Slattery but the others who are similarly situated, to join in their challenge in connection with the appeal which has been deferred pending the determination of this proceeding.

MR. HARRINGTON: That is acceptable to Mr. Slattery, you Honor.

THE COURT: Is that agreeable to the plaintiffs as well?

MS. HERNANDEZ: Yes, your Honor.

THE COURT: Very well.

THE COURT: This is the decision of the court. Plaintiffs moved by order to show cause to hold respondent, Christopher Slattery ("Slattery") in civil contempt of court for violating the orders of this court which prohibited blocking access to medical facilities which performed abortions. Plaintiffs also seek to recover the costs and attorneys' fees they incurred in bringing this contempt motion.

Slattery cross-moved for an order pursuant to [208] Rule 12(b)(1) and 6, Fed.R.Civ.P., dismissing this proceeding or alternatively for the denial of the relief requested by plaintiffs.

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[1] Bracketed numbers indicate page numbers from transcript of unreported decision. (Tr. pp. 207-21, November 8, 1990).

For the reasons that follow, the motion to hold Slattery in civil contempt is granted, and the cross-motion is in all respects denied.

Familiarity with this court's opinions dated October 27,1988, and January 20, 1989 is assumed. In addition, the court assumes familiarity with its opinion dated February 27, 1990 and incorporates by reference the background facts and legal discussion which affect respondent Slattery.

As has been noted in the prior opinions of this court, plaintiffs commenced this action in New York State Supreme Court on April 25, 1988 seeking injunctive and declaratory relief to restrain a number of defendants, not including Slattery, from blocking access to medical facilities providing abortions. The initial proceedings were in state court, and on April 28, 1988 a temporary restraining order issued signed by Justice Herman Cahn of the Supreme Court, New York County, which in its initial form did not expressly enjoin Operation Rescue from blocking access to health-care facilities.

On May 2, as a result of a demonstration in front of a physician's office at 154 East 85th Street in [209] Manhattan, where abortions are performed, a second temporary restraining order was issued by Justice Cahn that enjoined the defendants from, "trespassing on, blocking, obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester Counties from May 2, 1988 to May 7, 1988."

Defendants removed the action to this court on May 3, 1988. On May 4, this Court ruled that it would adopt and continue Justice Cahn's May 2, 1988 order and would modify it by:

(1) adding coercive sanctions of $25,000 for each day that the defendants violated the terms of the order; and,

(2) requiring defendants to notify the City of New York in advance of the location of any demonstration.

This court also ruled that failure to give such advance notice would make defendants liable for any resulting costs incurred by the city.

Numerous events transpired between May 4, and October 7, 1988 which are set forth in this Court's prior opinion, and are not necessary for the purpose of this decision.

On October 7, 1988, plaintiffs moved to modify the Court's prior injunction to cover the dates October 28, 29, and 31, in response to defendant's publicized plan [210] to conduct a "National day of rescue" at the end of October.

At the conclusion of an evidentiary hearing conducted on October 25 and 27, 1988, the Court granted plaintiff's motion and signed an order providing for appropriate preliminary relief.

Notwithstanding the issuance of the modified preliminary injunction on October 27 and the denial of a stay pending appeal, Operation Rescue organized and conducted two demonstrations on the morning of October 29, 1988 within the geographical area covered by the October 27 order.

From at least 8 a.m. till about 12:15 p.m. on October 29 approximately 250 Operation Rescue demonstrators blocked ingress to and egress from the Women's Pavilion medical clinic on Ashford Avenue in Dobbs Ferry, New York.

By this time, the Court's inunction had been extended to persons who aided and abetted the defendants, and it is plaintiffs' contention that Slattery is such a person.

The Court finds that on the evening of October 27, 1988, Slattery spoke to supporters of Operation Rescue at a rally and training session conducted at Glad Tidings Tabernacle Church. Slattery instructed the audience concerning the blockade which was to take place on October 29 in Dobbs Ferry, New York. He indicated that the [211] participants should bring with them approximately $20 together with identification, and that they should be prepared to be arrested.

He then explained how to blockade a clinic including an activity described as "scooching", which appears to be a sideways movement which takes place while an individual is sitting down. Scooching enables the filling of gaps in the blockade in the event blockaders are removed by the police.

In the early morning of October 29, Slattery appeared at St. Agnes Church in the Times Square area of Manhattan. He directed people to proceed to the blockade site which up to that point had not been disclosed publicly. He subsequently to into a car driven by a woman from Staten Island and directed the driver to Dobbs Ferry.

He arrived at Dobbs Ferry at approximately 8 a.m. on the morning of October 29, 1988, and remained in the vicinity of the Women's Medical Center for the next four hours.

At approximately 8:30 a.m., he was present when Kelli Conlin read this Court's injunction through a bullhorn. He was present approximately an hour later when a police office read the injunction through a bullhorn. At that time he

was located approximately 15 feet from the police officer. The court has viewed a video tape of the [212] reading and notes that the reading was audible except for brief periods when the bullhorn appeared to malfunction.

In addition, the Court would note that, despite an earlier statement that he was unable to hear what was said, due to the noise of the crowd, the videotape, which contains an audio, clearly proved that the crowd was virtually silent during most if not all of the reading.

Accordingly the Court finds that, at the very least, Slattery had notice of the injunction between 8:00 and 9:30 a.m. on the morning of October 29, 1988.

Following this, Slattery, using a walkie-talkie and headset, assisted in supervising the demonstration. He communicated on the walkie-talkie with others, and in addition was involved with dealings with the media and the police.

At approximately 11:40 a.m., he participated in an arrangement which was made with the police that the demonstrators would leave the area of the clinic at approximately 12 noon and would not be arrested if they did so.

He is depicted in the videotape leading the demonstrators from the scene.

The Court finds that Slattery's activities on the morning of October 29, 1988 aided and abetted in the violation of this Court's prior orders, including the order [213] of October 27, 1988.

The second incident occurred on January 14, 1989 in front of the VIP Medical Associates Clinic located at 72 Fifth Avenue in Manhattan. Slattery does not contest that he participated in this demonstration, and that he had notice of this Court's orders of injunction.

The Court of Appeals in its decision in this case clearly outlined the applicable law governing civil contempt proceedings, stating in pertinent part, "A court's inherent power to hold a party in civil contempt may be exercised only when (1) the order the party allegedly failed to comply with is clear and unambiguous, (2) the proof of noncompliance is clear and convincing; and (3) the party has not diligently attempted in a reasonable manner to comply." 886 F.2d 1339 at 1351 (2d. Cir. 1989).

It is not necessary to show the party disobeyed the Court's order willfully *EEOC v. Local 638*, 753 F.2d 1172 at 1178 (2d. Cir. 1985).

Rule 65(d) Fed.R.Civ.P. provides that an injunctive order of the Court, "is binding only upon the parties to the action; their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

Rule 65(d) prevents defendants from carrying out [214] prohibited activity through others who have actual notice of the Court's orders. *Regal Knitwear v. NLRB*, 324 U.S. 9, 14 (1945).

Thus, civil contempt sanctions may be assessed against non-parties who had have actual notice of the orders in effect

at the time in question and participated with defendants in violating those orders.

Respondent has interposed his objection by a motion to dismiss pursuant to Rule 12(b)(1) and (6) Fed.R.Civ.P., asserting that this Court lacks jurisdiction to preside over these contempt proceedings, and he joins with the other respondents in arguing that the imposition of sanctions in the context of this case would be tantamount to criminal, not civil contempt. The Court has previously rejected these arguments when by others similarly situated, and rejects the arguments of Slattery as well.

The October 27, 1988 order with which we are principally concerned, clearly includes persons in the position of Slattery. For example, the October 27 order provided that "defendants, the officers, directors, agents, and representatives of defendants, and all other persons whomsoever acting in concert with them and with notice of this order (hereinafter "Operation Rescue or National Day of Rescue'") participants are (1), enjoined and restrained .... And it is further ORDERED that the failure to comply [215] with this Order by any Operation Rescue or National Day of Rescue participant with actual notice of the provisions of this order shall subject them to civil damages of $25,000 a day for any violations of this Order."

Similarly, the permanent injunction, which was in effect on January 14, 1989, defined Operation Rescue participants in the same manner as the October 27 order and provided that ... "The failure to comply with this Order by any Operation Rescue participant with actual notice of the provisions of this order shall subject him or her to civil damages of $25,000 per day for the first violation of this order, and it is further ORDERED each successive violation

of this Order shall subject the contemnor to a civil contempt fine double that of the previous order."

Both provisions more than adequately warned those acting in concert with the defendant that they will be subject to civil penalties of $25,000 per day for violations of these orders.

The orders fully satisfy the specificity requirements of Rule 65(d). See 886 F.2d at 1351-52.

Plaintiffs assert that Slattery is liable for $50,000 due to his active involvement with defendants in violating the Court's October 27 order and the permanent injunction. This amount is computed as follows:

(1) $25,000 for the demonstration in violation of [216] the October 27 order at Dobbs Ferry, New York on October 29, 1988.

(2) $25,000 for the demonstration in violation of the permanent injunction at the Margaret Sanger Clinic on January 14, 1989.

I am going to correct that. I have used the Sanger Clinic which is located on Second Avenue and 22nd Street. That demonstration took place on January 13 and is not before the Court. The January 14 demonstration was at the VIP Medical Associates Clinic in Manhattan. Any reference previously made to the site of the January 14, 1989 demonstration as being at the Margaret Sanger Clinic is amended. The location is as I have just indicated.

The Court found that Slattery had notice of the October 27 order and the preliminary injunction, and aided

and abetted in the demonstration which blocked access to the Women's Pavilion Medical Center in Dobbs Ferry, and respondent having determined not to contest the issues of the notice and participation in the January 14, 1989 demonstration which blocked access to the VIP Clinic, leads the Court to find that it has been established by clear and convincing proof that Slattery acted in concert with defendants in violating the Court's orders in blocking access to clinics with knowledge of the October 27 order and the permanent injunction.

[217] Consequently, Slattery is adjudged in civil contempt of the October 27, 1988 order, and the permanent injunction and is assessed coercive civil penalties in the amount of $50,000.

Slattery contends that penalties of this amount are unduly harsh and burdensome from a financial perspective. He is 35 years of age, has a wife and two children. His present salary is approximately $36,000 a year, and at the present time, he possesses little else in the way of assets, although the Court would point out that the record contains evidence of transfers of property during the period of June and July 1989 subsequent to the events in question and at approximately the same time as the present order to show cause was signed by this Court.

Generally, the sanctions imposed after a finding of civil contempt serve two functions: to coerce future compliance and to remedy past noncompliance. *See generally United States v. United Mine Workers*, 330 U.S. 258, 302-04 (1947).

So far as the first of these functions is concerned, the District Judge sitting in equity is vested with wide discretion in fashioning a remedy. *Vuitton et Fils S.A. v. Carousel*

Handbags, 592 F.2d 126, 130 (2d Cir. 1979). *See*, for example, *Ingraham Co. v. Germanow*, 4 F.2d 1002, 1003 (2d Cir. 1925).

[218] By contrast, once a plaintiff proves that he has suffered harm because of the violation of the terms of an injunction, compensatory damages are appropriate.

In the present case, the plaintiffs have not demonstrated that compensatory damages are appropriate. Therefore, the remedy which the Court has determined to impose is in the nature of a fine payable to the Treasury of the United States. The Court has determined to impose a civil penalty of $25,000 with respect to the violation on October 29, 1988, and a penalty of $25,000 with respect to the violation on January 14, 1989.

Respondent has stated that he does not intend to violate this Court's orders at any time in the future. In view of this statement, and in view of respondent's financial condition, the Court suspends execution of the judgment with respect to the fine of $25,000 imposed in connection with the events of October 29, 1988 on condition that respondent will not violate the aforementioned orders at any time in the future.

In the event the Court finds a future violation of these orders, the Court would be prepared to vacate the stay of execution with respect to that portion of the judgment which imposes a $25,000 fine with respect to the events of October 29, 1988.

Attorneys' fees and costs: Plaintiffs seek [219] attorneys' fees and costs from Slattery to compensate them for their expenditures in bringing on the motion for contempt.

The permanent injunction expressly warned, "that each contemnor shall be jointly and severally liable for all attorneys' fees and related costs incurred by plaintiffs in enforcing this Order."

This additional penalty can properly be viewed as a coercive fine designed to insure compliance. An award of attorneys' fees and costs serves the compensatory purpose of civil contempt and avoids penalizing the complainant who is protected by the order for the actions of contemnors who purposely violate that order. *See Local 28 v. EEOC*, 478 U.S. 421, 444, Note 23 (1986); *Vuitton et Fils v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir. 1979). (If the violation of the Court's orders is wilful, compensatory damages to the complainant should include reasonable costs for prosecuting the contempt including attorneys' fees.)

The evidence more than adequately demonstrates the intentional violation of this Court's orders by Slattery. Accordingly, Slattery is liable for the attorneys' fees and costs incurred by plaintiffs as a result of bringing the contempt motion against him.

Plaintiffs are directed to serve and file within 20 days of the date of this decision an application [220] detailing their expenses including their attorneys' fees regarding the contempt proceedings, and respondents' cross motion.

The Court directs that an order be settled on notice.

That constitutes the Court's decision. Consistent with the direction of the Court of Appeals for this circuit, I am prepared to hear counsel with respect to any factual or legal errors or omissions.

Ms. Hernandez.

MS. HERNANDEZ: Your Honor, only with respect to the United Mine Workers provision respecting the responsibility in failing to take any action to insure that the Court order would be followed. The affirmative responsibility of someone in Mr. slattery's position, according to the United Mine Workers case.

THE COURT: I believe since I found that he essentially aided and abetted in the violation of this Court's order, that is sufficient. I would agree, since he acted as an instructor, was equipped with a walkie-talkie and headset, he did indeed occupy a supervisory role. To the extent the finding is necessary, I would supplement my decision by finding that although he was in a supervisory position, he did not act in a way to insure compliance with [221] this Court's orders, but instead aided and abetted in violating the orders of the Court.

Do you wish to be heard further?

MS. HERNANDEZ: No, your Honor. Thank you.

THE COURT: Mr. Harrington?

MR. HARRINGTON: Your Honor, I have nothing other than the arguments that we previously made.

THE COURT: Very well.

MR. HARRINGTON: Thank you.

THE COURT: Court is adjourned.

APPENDIX-G

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN; New York City Chapter of the National Organization for Women; National Organization for Women; Religious Coalition for Abortion Rights-New York Metropolitan Area; New York State National Abortion Rights Action League, Inc.; Planned Parenthood of New York City, Inc.; Eastern Women's Center, Inc.; Planned Parenthood Clinic (Bronx); Planned Parenthood Clinic (Brooklyn); Planned Parenthood Margaret Sanger Clinic (Manhattan); OB-GYN Pavilion; the Center for Reproductive and Sexual Health; VIP Medical Associates; Bill Baird Institute (Suffolk); Bill Baird Institute (Nassau); Dr. Thomas J. Mullin; Bill Baird; Reverend Beatrice Blair; Rabbi Dennis Math; Reverend Donald Morlan; and Pro-Choice Coalition, Plaintiffs,

and

City of New York, Plaintiff-Intervenor,

Randall TERRY; Operation Rescue; Reverend James P. Lisante; Thomas Herlihy; John Doe(s) and Jane Doe(s), the last two being fictitious Names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein, Defendants.

No. 88 Civ. 3071(RJW).

United States District Court,
S.D. New York
May 31, 1990.

[1354]** Center for Constitutional Rights (David Cole, Mary M. Gundrum, Rhonda Copelon, of counsel), Now Legal Defense and Educ. Fund (Alison C. Wetherfield, Sarah E. Burns, of counsel), New York City, for plaintiffs.

Michael E. Tierney, New York City, Rutherford Institute of Connecticut, Inc., Milford, Conn. (Joseph P. Secola, George J. Mercer, of counsel), for defendants.

A. Lawrence Washburn, Jr., New York City, for defendants and respondents Florence Talluto, Michael McMonagle, Michael La Penna, Jeff White.

John J. Broderick, Syosset, N.Y., for respondent Jesse Lee.

Kevin P. McGovern, Brooklyn, N.Y., for respondent Joseph Foreman.

Putney, Twombly, Hall & Hirson (John P. Hale, of counsel), New York City, for respondents Adelle and Bernard Nathanson.

Hogan & Traynor, (Richard J. Traynor, of counsel), Morristown, N.J., for respondent Robert Pearson.

ROBERT J. WARD, District Judge.

Plaintiffs move for an award of reasonable attorney's fees and costs against defendants pursuant to 42 U.S.C. § 1988 for services rendered in litigating this action from the spring of

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** Bracketed numbers indicate page numbers from decision reported at 737 F.Supp. 1350 (S.D.N.Y. 1990).

1988 through the spring of 1989. In addition, plaintiffs seek attorney's fees and costs against certain defendants and other individuals and organizations acting in concert with those defendants (collectively "respondents") who were adjudged in civil contempt of this Court's orders in an Opinion dated February 27, 1990 (the "February 27 Opinion"), 732 F.Supp. 388. Attorney A. Lawrence Washburn, Jr. ("Washburn") has filed a motion to vacate that portion of the February 27 Opinion which imposed sanctions against him under Rule 11, Fed. R. Civ. P. For the reasons that follow, plaintiffs' motion for an award of attorney's fees and costs against defendants under section 1988 and plaintiffs' application for attorney's fees and costs against the contemnors are granted in part and denied in part. Washburn's motion to vacate the imposition of Rule 11 sanctions is denied.

Background

In April 1988, plaintiffs filed suit against defendants claiming violations of 42 U.S.C. § 1985(3) and New York State law. Plaintiffs sought injunctive and declaratory relief to restrain defendants from blocking access to medical facilities providing abortions. On May 4, 1988, this Court issued an order ("the May 4 Order") which enjoined defendants from obstructing ingress into or egress from abortion facilities in the New York City area, and which provided for coercive fines of $25,000 for each day defendants violated the terms of the order. Defendants moved to vacate the May 4 Order for plaintiffs' alleged failure to comply with Rule 65(c), Fed. R. Civ. P. That motion was denied on May 6, 1988. Also on that date, the Court of Appeals denied defendants' application for a stay of the May 4 Order pending appeal.

On May 31, 1988, plaintiffs sought to have defendants adjudged in civil contempt for demonstrations held in violation

of the May 4 Order on May 5 and 6, 1988. In an Opinion dated October 27, 1988 ("the October 27 Opinion"), this Court granted plaintiffs' motion, denied defendants' cross-motion to dismiss, and adjudged defendants Randall Terry ("Terry") and Operation Rescue in civil contempt of the May 4 Order for their activities during the May 5 and May 6 demonstrations. 697 F.Supp. 1324, 1338. Accordingly, a judgment was entered by the Court holding Terry and Operation Rescue jointly and severally liable for $50,000.00 in civil contempt sanctions to be paid to plaintiff, National Organization for Women ("N.O.W."). In addition a judg- **[1355]** ment was entered in the amount of $19,141.00 in favor of the City of New York for the costs it incurred as a result of defendants' failure to provide advance notice of either demonstration.

On October 7, 1988, plaintiffs moved to modify the Court's prior injunction to cover the dates October 28, 29 and 31, 1988, in response to defendants' publicized plan to conduct a "National Day of Rescue" at the end of October. At the conclusion of an evidentiary hearing conducted on October 25 and 27, 1988, the Court granted plaintiffs' motion and signed an order granting plaintiffs the modified preliminary relief they sought ("the October 27 Order"). Defendants' applications to the Court and to the Court of Appeals for a stay pending appeal of the October 27 Order were denied.

On December 21, 1988, plaintiffs moved for summary judgment and a permanent injunction upon receiving notice of blockades planned by Operation Rescue in the New York City area from January 12 to 14, 1989. These blockades had been organized in express retaliation for this Court's October 27 Opinion. 697 F.Supp. 1324. *See* Exhibit A, annexed to Affirmation of Mary M. Gundrum, filed December 21, 1988 (Letter from Randall Terry, dated November 16, 1988, urging participation in January blockades of "abortion mills" in the New

York City area in order to "face down" this Court). On January 6, 1989, the Court heard oral argument on plaintiffs' motion for summary judgment and defendants' motion to dismiss and, on January 10, 1989, the Court issued a permanent injunction that again enjoined defendants from blocking access to medical facilities offering abortions and included coercive sanctions of $25,000 per day for violations of the order (the "Permanent Inunction"). The Permanent Injunction was modified from the previous orders to provide that each successive violation of the injunction would result in doubling the civil contempt sanction applicable to the contemnor.

On January 20, 1989, the Court issued an opinion granting plaintiffs' motion for summary judgment on their common law trespass claim and on their 42 U.S.C. § 1985(3) federal cause of action and permanently enjoining Operation Rescue and its participants from blocking ingress into and egress from medical facilities providing abortion related services ("the January 20 Opinion").

Defendants appealed from the various orders entered by this Court. The Court of Appeals, in an Opinion dated September 20, 1989, affirmed this Court's rulings which, *inter alia*, (1) enjoined defendants from blocking access to clinics offering abortions, (2) held Terry and Operation Rescue in contempt for violation of the May 4 Order, and (3) imposed discovery sanctions on defendants. 886 F.2d 1339. The ruling regarding payment of the civil contempt sanctions was modified to provide that the coercive penalties for violations of the orders be payable into Court, not to plaintiff N.O.W. 886 F.2d at 1353. Defendants' petition for certiorari was denied by the Supreme Court on May 21, 1990. ____ U.S. ___, 110 S.Ct. 2206, 109 L.Ed.2d 532.

On June 9, 1989, plaintiffs moved by order to show cause to hold defendants Operation Rescue, Terry, Thomas Herlihy ("Herlihy") and respondents Bistate Operation Rescue Network ("B.O.R.N."), Jesse Lee ("Lee"), Joseph Foreman ("Foreman"), Michael McMonagle ("McMonagle"), Jeff White ("White"), Michael La Penna ("La Penna"), Florence Talluto ("Talluto"), Adelle Nathanson ("A. Nathanson"), Bernard Nathanson ("B. Nathanson") and Robert Pearson ("Pearson") in civil contempt for violating the May 4 Order, the October 27 Order and/or the Permanent Injunction.[1] The Court conducted a hearing on August 9, 10, 15 and 16, 1989 to determine factual issues disputed by respondents B. Nathanson, A. Nathanson and Pearson.

On February 27, 1990, the Court issued a decision granting in part and denying in part plaintiffs' motion for contempt. De-[1355]fendants Randall Terry and Operation Rescue were adjudged in civil contempt of the October 27 Order and Permanent Injunction and assessed coercive civil penalties in the amount of $100,000. Defendant Herlihy was adjudged in civil contempt of the May 4 Order and assessed coercive civil penalties in the amount of $25,000. Respondent B.O.R.N. was adjudged in civil contempt of the October 27 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Lee was adjudged in civil contempt of the May 4 Order, October 27 Order and Permanent Injunction and assessed coercive civil penalties in the amount of $100,000. Respondent Foreman was adjudged in civil contempt of the May 4 Order and Permanent Injunction and assessed coercive civil penalties in the amount of $25,000. Respondents McMonagle and White were adjudged in

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[1] Three additional individuals were initially named as respondents, but were not involved in the subsequent contempt proceeding.

civil contempt of the Court's Permanent Injunction and each assessed coercive civil penalties in the amount of $25,000. Respondent La Penna was adjudged in civil contempt of the May 4 Order and October 27 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Talluto was adjudged in civil contempt of the October 27 Order and Permanent Injunction and assessed coercive civil penalties in the amount of $50,000. Respondent A. Nathanson was adjudged in civil contempt of the October 27 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Pearson was adjudged in civil contempt of the Permanent Injunction and assessed coercive civil penalties in the amount of $25,000. Respondent B. Nathanson was not adjudged in civil contempt.

The Court held that each of the contemnors was liable to plaintiffs for a pro rata share of the attorney's fees and costs incurred by plaintiffs as a result of bringing the contempt motion against him or her, with the exception of those expenses associated with a renewed cross-motion to dismiss filed by Washburn on behalf of respondents Talluto, La Penna, White and McMonagle. The cross-motion to dismiss was denied and sanctions were imposed under Rule 11 against Washburn for refiling this frivolous motion in contravention of the Court's instructions. Washburn was held liable to plaintiffs for the attorney's fees and costs they incurred as a result of filing their motion for Rule 11 sanctions and responding to his renewed cross-motion to dismiss.

In their motion under section 1988, plaintiffs seek $306,423 in attorney's fees and $4,294.31 in costs. This requested fee award is based on a lodestar amount of $153,211.50 and a multiplier of 2.0. Defendants dispute the applicability of section 1988 to their conduct, take issue with the authenticity and clarity of certain of the time records produced by plaintiffs and argue that a multiplier is inappropriate.

In their application for attorney's fees and costs against the contemnors, plaintiffs seek to recover a total of $121,073.50. Respondents Talluto, La Penna, White and McMonagle argue that attorney's fees may only be awarded under section 1988, not as a consequence of their contempt, and that a fee award under section 1988 is improper in this case. Respondent A. Nathanson argues that she should not be liable for any attorney's fees because she was adjudged in contempt of only one of the two orders which plaintiffs' alleged she had violated. Respondent Pearson joins in this argument. Respondent B. Nathanson claims that he should be awarded his attorney's fees and costs because he was not found in contempt. No other opposition to the fee application has been filed.

Plaintiffs seek $11,712.47 for attorney's fees and costs incurred as a result of Washburn's violation of Rule 11. Washburn, in his motion to vacate the imposition of Rule 11 sanctions, argues that an evidentiary hearing was required before sanctions could be imposed, and challenges certain procedural steps taken by plaintiffs in pursuing their Rule 11 motion.

The Court will first discuss plaintiffs' entitlement to fees under section 1988, the reasonableness of the award they request and defendants' objections to this award. Next, the Court will address the reasonableness of plaintiffs' application for fees against the contemnors, and the objections [1357] raised by the contemnors to this fee request. Finally, the Court will consider Washburn's motion to vacate the imposition of Rule 11 sanctions and the reasonableness of the attorney's fees and costs requested by plaintiffs.

Discussion

A. *42 U.S.C. § 1988*

Pursuant to the Civil Rights Attorney's Fees Award Act of 1976, a district court, in its discretion, may award attorney's fees and costs to the prevailing party in any action or proceeding to enforce certain civil rights acts. 42 U.S.C. § 1988.[2]

1. *Entitlement to Fees-Plaintiffs as Prevailing Parties*

The statutory language of section 1988 creates a presumption in favor of fee awards, *Di Filippo v. Morizio*, 759 F.2d 231, 234 (2d Cir. 1985), and a prevailing party is ordinarily entitled to recover fees and costs unless there are special circumstances which would render such an award unjust. *See Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 88 S.Ct. 964, 966 19 L.Ed.2d 1263 (1968).

The Supreme Court has recently explained that a party meets the threshold requirement necessary to be considered a

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[2] Section 1988 states, in pertinent part, that: In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Section 1988 has been interpreted in the same manner as the other fee-shifting provisions for particular civil rights claims which contain the "prevailing party" language. *See Independent Federation of Flight Attendants v. Zipes*, ___ U.S. ___, 109 S.Ct. 2732, 2735, n. 2, 105 L.Ed.2d 639 (1989).

prevailing party under section 1988 if he or she succeeds on "any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Texas State Teachers Ass'n v. Garland Independent School District*, 489 U.S. 782, 109 S.Ct. 1486, 1493, 103 L.Ed.2d 866 (1989) (rejecting the "central issue" test for determining an award of attorney's fees). *See also, Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983).

The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute.

Texas State Teachers Ass'n v. Garland Independent School District, supra, 109 S.Ct. at 1493.

Defendants concede, as they must in light of the numerous legal issues decided in plaintiffs' favor and plaintiffs' success in obtaining a permanent injunction, that "it is clear that the plaintiffs are 'prevailing parties' and that defendants are 'losing parties.'" Memorandum of Law, filed March 16, 1990 at 6. They argue, however, that special circumstances exist which render a fee award in this case unjust. Specifically, defendants maintain that they are immune from an award of attorney's fees because, as a *per se* rule, activity in opposition to abortion is exempt from the application of section 1988, and their conduct was motivated by a true desire to oppose abortion. They also argue that they should be treated as civil rights plaintiffs for purposes of the fee shifting analysis.

No case authority has been cited by defendants in support of their position that the civil rights fee shifting statute contains an exemption for cases involving abortion, and the Court rejects this proposed *per se* ban. *See Haskell v. Washington Township*,

864 F.2d 1266, 1279 (6th Cir. 1988) (plaintiff entitled to fees under § 1988 in suit challenging zoning ordinances as infringing on right to abortion); *Planned Parenthood of Central and Northern Arizona v. Arizona*, 789 F.2d 1348, 1351-52 (9th Cir.) (plaintiff awarded fees under § 1988 after successfully challenging restrictions on the use of state funds for abortion-related services), *aff'd*, 479 U.S. 925, 107 S.Ct. 391, 93 L.Ed.2d 346 (1986); **[1358]** *Cf. Diamond v. Charles*, 476 U.S. 54, 69-70, 106 S.Ct. 1697, 1707-08, 90 L.Ed.2d 48 (1986) (intervenor lacked standing to contest the merits of a decision enjoining a state statute which attempted to restrict the availability of abortion, despite an award of attorney's fees against him under section 1988); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 494, 103 S.Ct. 2517, 2526, 76 L.Ed.2d 733 (1983) (judgment of lower court invalidating certain restrictions on abortion affirmed in part and reversed in part, and judgment awarding attorney's fees under section 1988 for all hours expended by plaintiffs' counsel remanded for further proceedings to determine a reasonable fee consistent with the dictates of *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)).

Furthermore, the alleged or actual good faith of a defendant in carrying out the conduct which is found to violate the civil rights laws is not found to violate the civil rights laws is not sufficient to deny an attorney's fee award. *See Hutto v. Finney*, 437 U.S. 678, 693, 98 S.Ct. 2565, 2574, 57 L.Ed.2d 522 (1978); *Rose v. Heintz*, 806 F.2d 389, 391-92 (2d Cir. 1986). Consequently, the strength of defendants' convictions does not immunize them from the civil rights fee shifting statue.

Defendants have not attempted to demonstrate that any of their conduct was intended to further, or did further, the congressional civil rights policies behind 42 U.S.C. §§ 1981,

1982, 1983, 1985, or 1986, or Title IX of Public Law 92-318 or Title VI of the Civil Rights Act of 1964. *See* 42 U.S.C. § 1988. Therefore, defendants are not in a position analogous to losing civil rights plaintiffs, and the more stringent test for awarding fees against unsuccessful plaintiffs suing under the civil rights statutes is completely inapplicable to this case. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978) (recovery of fees against an unsuccessful civil rights plaintiff appropriate only "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation").

Similarly, defendants' argument against the award of fees finds no support in the Supreme Court's recent decision in *Independent Federation of Flight Attendants v. Zipes, supra*, 109 S.Ct. at 2732. In *Zipes*, the Supreme Court held that attorney's fees may be assessed against a blameless intervenor who was not found to be liable to a prevailing plaintiff only if the intervenor's action was "frivolous, unreasonable, or without foundation." *Id.* at 2736. The majority premised its holding on the need for a connection between liability for violation of federal law and liability of attorney's fees under the federal fee shifting statutes. *Id.* at 2737. In this case, of course, defendants have been held liable for violations of plaintiffs' civil rights. Thus, they can take no refuge in case law designed to shield from fee shifting those who have not violated the civil rights laws.

In sum, defendants enjoyed no civil or constitutional right to block access to the clinics in violation of the civil rights of plaintiffs. Nor did defendants have any arguable right willfully to disregard the orders of this Court and encourage others to do the same, especially when these orders were narrowly crafted to balance defendants' First Amendment rights with the rights of plaintiffs. *See* 886 F.2d at 1363-64.

Accordingly, the Court finds no special circumstances exist which would render an award of attorney's fees in this case anything but just.

The Court concludes that plaintiffs are prevailing parties under section 1988, entitled to an award of attorney's fees and costs.

2. *The Amount of the Section 1988 Fee Award*

The Supreme Court recently articulated the following summary of the legal standards for determining the amount of an appropriate fee award.

> A reasonable attorney's fee under § 1988 is one calculated on the basis of rates and practices prevailing in the relevant market, *i.e.*, "in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation," **[1359]** *[Blum v. Stenson*, 465 U.S. 886, 896 n. 11, 104 S.Ct. 1541, 1547 n. 11, 79 L.Ed.2d 891 (1984)], and one that grants the successful civil rights plaintiff a "fully compensatory fee," [*Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S.Ct. 1933, 1940, 76 L.Ed.2d 40 (1983)], comparable to what is "traditional with attorneys compensated by a fee-paying client." S.Rep. No. 94-1011, p. 6 (1976), U.S. Code Cong. & Admin. News 1976, pp. 5908, 5913.

Missouri v. Jenkins, ___ U.S. ___, 109 S.Ct. 2463, 2470, 105 L.Ed.2d 229 (1989).

The lodestar method is used to establish the amount of an attorney's fees award under the federal civil rights fee shifting statute. *Blanchard v. Bergeron*, 489 U.S. 87, 109 S.Ct. 939, 945, 103 L.Ed. 2d 67 (1989); *Hensley v. Eckerhart, supra*, 461 U.S. at 433, 103 S.Ct. at 1939. The lodestar is calculated by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate of compensation for each attorney involved. This calculation serves as a useful starting point for determining the amount of a reasonable fee, as it provides an objective basis on which to make an initial estimate of the value of a lawyer's services. *Hensley v. Eckerhart, supra*, 461 U.S. at 433, 103 S.Ct. at 1939.

The ultimate amount of the fee must be determined on the facts of each case, *id.* at 429, 103 S.Ct. at 1937, and the lodestar amount may be adjusted based on the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). *E.g., Blanchard v. Bergeron, supra*, 109 S.Ct. at 943-45[3] Nevertheless, once the applicant

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[3] These factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *E.g., Blanchard v. Bergeron, supra*, 109 S.Ct. at 943 n. 5 (citing *Johnson v. Georgia Highway Express, Inc., supra*, 488 F.2d at 717-19). Usually, however, most of these factors are subsumed within the initial lodestar calculation of hours reasonably expended at a reasonably hourly rate. *United States Football League v. National Football League*, 887 F.2d 408, 415 (2d Cir. 1989).

for a fee award has established the reasonableness of the claimed rate and the number of hours expended, the resulting lodestar figure is presumed to be the reasonable fee to which counsel is entitled. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 564, 106 S.Ct. 3088, 3097, 92 L.Ed.2d 439 (1986) ("Delaware Valley I"); *Blum v. Stenson, supra*, 465 U.S. at 897, 104 S.Ct. at 1548.

In this Circuit, an application for attorney's fees "should normally be disallowed unless accompanied by contemporaneous time records indicating, for each attorney, the date, the hours expended, and the nature of the work done." *New York State Association for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1154 (2d Cir. 1983). Contemporaneous time records are necessary so that the Court is not faced with an impossible task when asked to determine an appropriate fee amount, and lawyers are not required to expend even more time reconstructing the past in assembling the fee application. *Id.* at 1147-48. The burden to present such records to the Court rests squarely on the party requesting remuneration. *See Hensley v. Eckerhart, supra*, 461 U.S. at 437, 103 S.Ct. at 1941; *Carrero v. New York City Housing Authority*, 685 F.Supp. 904, 909 (S.D.N.Y. 1988).

a. *Reasonableness of hours requested*

Plaintiffs seeks reimbursement for 281.9 hours of work by Alison Wetherfield ("Wetherfield"), a staff attorney at the NOW Legal Defense and Education Fund, 330.5 hours of work by David Cole ("Cole"), an attorney for the Center for Constitutional Rights, and 247.25 hours of work by Mary M. Gundrum ("Gundrum"), a staff attorney at the Center for Constitutional Rights. They have not sought to recover for the work done by certain co-[1360]counsel, as, in their billing judgment, this time was duplicative. Nor have they sought fees

for substantial time expended by law student interns in assisting in the preparation of this case.[4]

Defendants do not contest the amount of time requested for Wetherfield's efforts, and the Court finds this time amply documented and reasonable.

Defendants claim that plaintiffs have failed to supply contemporaneous time records for attorneys Gundrum and Cole. Both attorneys, however, have submitted affidavits in which they aver that contemporaneous time records were maintained, and that these records were replicated and submitted to the Court in support of the motion. *See* Declaration of David Cole, filed December 6, 1989 ¶ 6; Declaration of Mary M. Gundrum, filed December 6, 1989 ¶ 6. *Cf. United States Football League v. National Football League*, 704 F.Supp. 474, 477 (S.D.N.Y.) (re-typed computer records satisfied contemporaneous time record requirement), *aff'd*, 887 F.2d 408 (2d Cir. 1989).

Defendants have not attempted to submit evidence which calls into question the accuracy and reasonableness of the hours charged, or the facts asserted in the affidavits submitted by plaintiffs' attorneys. *See Blum v. Stenson, supra*, 465 U.S. at 892 n. 5, 104 S.Ct. at 1545 n. 5. As the Third Circuit has explained, when a party opposing a fee application

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[4] Plaintiffs have also excluded time spent inefficiently or on certain administrative tasks. *See* Declaration of Alison Wetherfield, filed December 6, 1989 at ¶ 6; Declaration of Mary M. Gundrum, filed December 6, 1989 at ¶ 6. In addition, the fee request does not include any time for which plaintiffs have already been compensated in connection with their earlier motion for fees pursuant to Rule 37(d), Fed.R.Civ.P.

> "has been afforded the opportunity to raise a material fact issue as to the accuracy of representations as to hours spent, or the necessity for their expenditure, and declines to do so, no reason occurs to us for permitting the trial court to disregard the uncontested affidavits filed by a fee applicant."

Northeast Women's Center v. McMonagle, 889 F.2d 466, 477 (3rd Cir. 1989) (citation omitted), *cert. denied*, ____ U.S. ____, 110 S.Ct. 1788, 108 L.Ed.2d 790 (1990).

In addition, defendants argue only that the time records for attorneys Cole and Gundrum are vague, not that the time they expended was excessive. Contemporaneous time records are sufficiently detailed, however, if the "general subject matter of [the] time expenditures" are identified; "[p]laintiff's counsel, of course, is not required to record in great detail how each minute of his time was expended." *Hensley v. Eckerhart, supra*, 461 U.S. at 437 n. 12, 103 S.Ct. at 1941 n. 12. The Court has reviewed the time records presented by plaintiffs for the work of attorneys Cole and Gundrum, and finds them sufficiently detailed to allow the Court objectively to evaluate the nature and reasonableness of the time expended.

In the Court's view, the total time requested by plaintiffs for the work of the three attorneys is reasonable in light of the circumstances under which they litigated this case. This action presented novel and difficult questions of law involving section 1985(3), and plaintiffs' skillful representation was instrumental in obtaining the success they achieved before this Court and the Court of Appeals.

Furthermore, the Court finds that plaintiffs' utilization of a team of attorneys was warranted given defendants' continual

acts in violation of the Court's orders, the need to respond to these acts on short notice, the complexity of the issues involved, and the battery of counsel retained by defendants. *See Siegal v. Merrick*, 619 F.2d 160, 164 (2d Cir. 1980) (plaintiff's staffing conferences or court appearances with more than one lawyer may be warranted, especially when "confronted with a bevy of hostile lawyers for the multiple parties on the other side"); *McKever v. Vondollen*, 681 F.Supp. 999, 1002-03 (N.D.N.Y. 1988) (compensation for the use of multiple attorneys at trial reasonable). Indeed, defendants do not contend that plaintiffs' coun-**[1361]**sel failed to work efficiently, or that their work was duplicative.

Moreover, the confrontational and litigious posture adopted by defendants throughout much of this litigation placed heightened demands on plaintiffs' counsel, increasing the amount of time counsel needed to spend to defend plaintiffs' rights and monitor the enforcement of the Court's orders. Given the foregoing, the Court concludes that the number of hours for which plaintiffs seek compensation is reasonable.

b. *Reasonableness of rates*

Plaintiffs seek hourly rates of $160 for Wetherfield, $170 for Cole, and $210 for Gundrum. Defendants have not objected to the reasonableness of the rates suggested by plaintiffs.

Prevailing parties under the civil rights fee shifting statute are entitled to reasonable hourly rates which fall within the prevailing marketplace rates "in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum v. Stenson, supra*, 465 U.S. at 896 n. 11, 104 S.Ct. at 1547 n. 11.

Plaintiff's counsel all work for non-profit organizations which have not billed plaintiffs for their time. The suggested rates were arrived at by looking to the rates charged by major New York City law firms with litigation practices. This was proper, as in determining the elements of reasonable attorney's fees, courts have consistently looked to the marketplace as a guide, *Missouri v. Jenkins, supra*, 109 S.Ct. at 2470, and in determining whether the requested rates fall within the prevailing market rate, "rates charged in private representations may afford relevant comparisons." *Blum v. Stenson, supra*, 465 U.S. at 896 n. 11, 104 S.Ct. at 1547 n. 11. *See Miele v. New York State Teamsters Conference Pension & Retirement Fund*, 831 F.2d 407, 408-09 (2d Cir. 1987) (court may apply prevailing market rates for "Wall Street" associates to fee award for non-profit organization). As the work in this case spans only the past two years, it was also appropriate to use current, rather than historic rates. *See New York State Association for Retarded Children v. Carey, supra*, 711 F.2d at 1153.

The Court finds these rates to be reasonable, given the evidence presented by plaintiffs' of the rates charged by private law firms in New York City, counsel's experience in civil rights litigation, the high quality of counsel's representation and the degree of success counsel achieved in the lawsuit. *Cf. County of Suffolk v. Long Island Lighting Co.*, 701 F.Supp. 1477, 1481 (E.D.N.Y. 1989) (partners awarded between $175-275 per hour, associate awarded $175 per hour).

c. *Enhancement of the lodestar*

Plaintiffs argue that the lodestar should be enhanced by a multiplier of 2.0. Defendants oppose any enhancement.

The Supreme Court has explained that an enhancement of a fee award is proper only in certain and exceptional cases. *Delaware Valley I, supra*, 478 U.S. at 565, 106 S.Ct. at 3098; *Blum v. Stenson, supra*, 465 U.S. at 898-901, 104 S.Ct. at 1548-1550. *See also Krieger v. Gold Bond Building Products*, 863 F.2d 1091, 1099 (2d Cir. 1988). The purpose of the fee-shifting statute is not to replicate exactly a private fee arrangement, but to ensure that private parties will able to retain counsel to further the objectives of the civil rights statutes. *See Delaware Valley I, supra*, 478 U.S. at 565, 106 S.Ct. at 3098. The applicant bears the burden of overcoming the presumption that the lodestar reflects a reasonable fee award and establishing that an enhancement is appropriate. *See Soler v. G&U, Inc.*, 658 F.Supp. 1093, 1102-03 (S.D.N.Y. 1987).

Plaintiffs argue that an enhancement is warranted in this case to compensate their attorneys for the risk of loss associated with their representation. Plaintiff had no funds with which to retain counsel. Affirmation of Noreen Connell, filed January 24, 1990 at ¶ 3. Counsel agreed to represent them on a contingency fee basis, with compensation for their efforts dependent on plaintiffs' success on the merits of the civil rights claim and a [1362] statutory award of attorney's fees against defendants. *Id.*

Plaintiffs maintain that this contingency arrangement created a risk of loss which merits an enhancement of the lodestar.[5]

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[5] The question of whether a fee award under the fee shifting statutes can be enhanced for the risk of loss associated with contingent representation has divided the Supreme Court. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 107 S.Ct. 3078, 97 L.Ed.2d 585 (1987) (plurality opinion reversing the enhancement of a fee award for contingency of success) ("Delaware Valley II").

In *Delaware Valley II*, four justices in the plurality (Chief Justice Rehnquist, and Justices White, Powell and Scalia) concluded that "enhancement of a reasonable lodestar fee to compensate for assuming the risk of loss is impermissible under the usual fee shifting statutes," *id.* at 727, 107 S.Ct. at 3087, and that even if such enhancement was permissible, it may occur only in "exceptional cases" where evidence is presented that "without risk enhancement plaintiff would have faced substantial difficulties in finding counsel in the local or other relevant market." *Id.* at 730-31, 107 S.Ct. at 3089-90.

Justices Blackmun, Brennan, Marshall and Stevens dissented. They maintained that enhancement for contingency is appropriate when counsel is not able to mitigate the risk of nonpayment and when other economic risks are aggravated by the contingency arrangement. *Id.* at 747, 749, 107 S.Ct. at 3098, 3099 (Blackmun, J., dissenting).

Justice O'Connor, concurring, agreed with the four dissenting justices that enhancement for the risks of contingent representation is proper under the fee shifting statutes, but concluded that the record in the lower court did not support an enhancement. Therefore, she joined in the plurality opinion reversing the enhancement of the fee award. *Id.* at 734, 107 S.Ct. at 3091 (O'Connor, J., concurring).

(continued...)

In an of itself, the existence of a contingency arrangement is not a sufficient basis for increasing the amount of the fee award above the lodestar. *Lewis v. Coughlin*, 801 F.2d 570, 575 (2d Cir. 1986). Under certain circumstances, however, representing a client on a contingent basis creates a risk of nonpayment that may warrant an adjustment of the fee award to compensate the attorney for the assumption of this risk. *Id. See also Delaware Valley II; Wells v. Bowen*, 855 F.2d 37, 45 (2d Cir. 1988). The Second Circuit has explained that, in considering whether an enhancement is appropriate for the contingency factor, the rationale that should guide the court's discretion is whether without the possibility of a fee enhancement, competent counsel might refuse to represent civil rights clients thereby denying them effective assess to the court. *Friends of the Earth v. Eastman Kodak Co.*, 834 F.2d 295, 298

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[5](...continued)

Justice O'Connor further agreed with the dissenters that "compensation for contingency must be based on the difference in market treatment of contingent fee cases *as a class*, rather than an assessment of the "riskiness" of any particular case." *Id.* at 731, 107 S.Ct. at 3089 (emphasis in the original). She noted, however, that contingency enhancements should be reserved for those situations where the "applicant can establish that without an adjustment for risk the 'prevailing party would have faced substantial difficulties in finding counsel in the local or relevant market,'" *id.* at 733, 107 S.Ct. at 3091 (quoting plurality opinion at 731, 107 S.Ct. at 3089), and that the fee applicant seeking an enhancement must bear the burden of proving the degree to which the relevant market compensates for contingency. *Id.*

Thus, a majority of the Supreme Court agreed that an enhancement of a fee award to compensate for the risk of loss inherent in a contingent fee relationship is permissible, at least under certain circumstances.

(2d Cir. 1987) (citing *Lewis v. Coughlin, supra*, 801 F.2d at 576).[6]

Plaintiffs initially encountered difficulty in securing representation from attorneys in private practice. Affirmation of Noreen Connell, *supra* at ¶ 2. No evidence has been presented, however, regarding the reasons these other attorneys refused to represent plaintiffs, or that without a fee enhancement for risk of loss private attorneys would be unwilling to undertake similar cases which ultimately further the objectives of the civil rights statutes. *Cf. Wilkinson v. Forst*, 729 F.Supp. 1416, 1419 (D. Conn. 1990) (25% enhancement justified given pervasive difficulties plaintiff encountered in attracting counsel). Furthermore, the Court has not been presented with evidence on how the relevant market [1363] compensates for contingency. *See Delaware Valley II*, 483 U.S. at 733, 107 S.Ct. at 3090-91 (O'Connor, J., concurring); *Meriwether v. Coughlin*, 727 F.Supp. 823, 829-30 (S.D.N.Y. 1989). Thus, an enhancement for risk of loss is not called for on the record in this case.

The lack of an enhancement is not meant in any way to disparage the outstanding representation afforded plaintiffs by their counsel, the degree of success achieved, or the contentious nature of the litigation plaintiffs undertook against multiple, obstreperous defendants. These factors, however, have already been taken into account in determining the reasonable fee award.

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[6] The Second Circuit stated that this rationale "is similar to that taken by the plurality and Justice O'Connor in [Delaware Valley II]." *Friends of the Earth v. Eastman Kodak Co., supra*, 834 F.2d at 298. The Court notes that this approach is also consistent with the purpose behind section 1988: "to make sure that competent counsel was available to civil rights plaintiffs." *Blanchard v. Bergeron, supra*, 109 S.Ct. at 944.

See Krieger v. Gold Bond Building Products, supra, 863 F.2d at 1099-1100.

d. *Costs*

Plaintiffs seeks to $4,294.31 in costs. Under the civil rights fee shifting statutes, a court will generally award "those reasonable out-of pocket expenses incurred by the attorney and which are normally charged fee paying clients." *Reichman v. Bonsignore, Brignati & Mazzotta P.C.*, 818 F.2d 278, 283 (2d Cir. 1987) (quoting district court). A prevailing party may be reimbursed for expenditures which add to the proceeding and are not in part of the attorney's ordinary overhead. *See Carrero v. New York City Housing Authority, supra,* 685 F.Supp. at 909. Defendants have not challenged the reasonableness of the amount of costs requested, and the Court finds that plaintiffs have adequately detailed the breakdown of the costs incurred and that these expenditures were reasonable. *See Kuzman v. Internal Revenue Service*, 821 F.2d 930, 933-34 (2d Cir. 1987) (photocopying, telephone and postage expenses compensable).

Thus, the Court concludes that, under section, 1988, plaintiffs are entitled to an award of attorney's fees in the amount of $153,211.50 and costs in the amount of $4,294.31.

B. *Fee Application Against The Contemnors*

Plaintiffs seek a total of $121,073.50 in attorney's fees and costs from the contemnors as authorized by this Court's decision of February 27, 1990. This amount is broken down into two phases. The first phase lasted from approximately April 1989 until July 1989, during which time plaintiff's counsel collected evidence of the violations of this Court's orders and drafted plaintiffs' Order to Show Cause for Civil Contempt and

supporting documents. This phase included service of process on all contemnors, an initial full day court appearance on July 28, 1989, when all counsel were present, and a court appearance on August 10, 1989, to address motions to dismiss. Plaintiffs have excluded from this phase all hours spent concerning those individuals named in the Order to Show Cause but not found in contempt. Plaintiffs assert, without contradiction, that the fees and costs incurred during this phase can fairly be assessed against all contemnors.

The second phase includes the time spent by plaintiffs in preparing for and conducting the evidentiary hearing on the contempt motion on August 9, 10, 15 and 16, 1989 against A. Nathanson, B. Nathanson and Pearson. This phase also includes hours expended drafting post-hearing submissions and a motion requesting that a portion of the transcript be stricken and sanctions be imposed on the Nathansons' attorney. Plaintiffs seek compensation for phase two fees and costs solely from those contemnors involved in the evidentiary hearing.

For phase one, plaintiffs seek compensation for 237.15 hours of Gundrum's time, 91.15 hours of Wetherfield's time and 17 hours expended by Cole. For phase two, plaintiffs seek compensation for 134.5 hours of Gundrum's time and 134.5 hours of Wetherfield's time. The rates requested are the same as those set forth in their application under section 1988. In addition, plaintiffs seeks reimbursement for $3,487.83 and $419.17 in costs for phase one and phase two, respectively. In total, plaintiffs' requests' request $70,889.33 for attorney's fees and costs for phase one and $50,184.17 for attorney's fees and costs for phase two.

[1364] The contemnors have not challenged the reasonableness of the time spent by plaintiffs' counsel, the rates sought, or the amount of costs incurred in either phase.

Plaintiffs have provided the court with documentation of the time and costs expended and the Court finds the time and costs reasonable under the circumstances.

Talluto, La Penna, White and McMonagle argue that the award of attorney's fees upon a finding of contempt was improper, despite their willful violations of this Court's orders, because they claim attorney's fees may only be awarded under section 1988 in a civil rights action. No relevant support has been supplied in support of this argument, and the Court rejects the notion that section 1988 in some way immunizes a contemnor from an award of attorney's fees, or abrogates the Court's authority to vindicate its own orders and compensate an aggrieved party for the expenses of defending those orders from purposeful violations.

A. Nathanson argues that she should not be liable for any of plaintiffs' attorney's fees or costs. She maintains that, because she prevailed on the allegation that she violated the May 4 Order she should be entitled to an award of fees for that count, and this should "wash" with the fees sought for her adjudged violation of the October 27 Order. Pearson joins in this argument. The Court disagrees.

While discharged contemnors may be able to recover "against the complainant for costs and disbursements and a reasonable counsel fee," any such award is committed to the discretion of the Court. Rule 43(d), Civil Rules of the United States Courts for the Southern and Eastern Districts of New York. Such an award is completely unwarranted here, as the evidence submitted in support of the allegations that A. Nathanson and Pearson violated the May 4 Order was not insubstantial, and supplied an adequate basis to support plaintiffs'

filing of the motion against them.[7] Moreover, it was A. Nathanson's denial of the facts relating to her violation of the October 27 Order, and Pearson's denial of the facts relating to his violation of the Permanent Injunction, which resulted in much of the expense of the evidentiary hearing. Plaintiffs, whose rights were violated, should not be forced to bear the costs of vindicating those rights and enforcing the Court's orders.

The Court agrees, however, that A. Nathanson and Pearson, as well as the other contemnors, should only be required to bear the costs associated with the violation or violations they were found to have committed. Accordingly, each contemnor was made liable only for "a pro rata share of the attorney's fees and cost incurred by plaintiffs as a result of bringing the contempt motion against him or her." February 27 Opinion, at 54. The Court now turns to determine the pro rata share for each contemnor.

1. *Allocation of Phase One Fees and Costs*

The Court believes it is appropriate to assess the total attorney's fees and costs incurred against all contemnors in phase one in accordance with the number of days each contemnor was found to have violated the Court's orders, out of the number of

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[7] Similarly, in the Court's view B. Nathanson's request for fees is unwarranted, as the evidence adduced regarding plaintiffs' claim that he knowingly violated the Permanent Injunction presented a close factual question.

violations alleged by plaintiffs.[8] For phase one, plaintiffs alleged that the contemnors, collectively, committed a total of twenty-two (22) violations of the Court's orders. The Court found twenty (20) distinct viola-[1365]tions had occurred in its February 27 Opinion. The pro rat share of the phase one fees and costs for each contemnor is as follows:

Contemnor	Number of Violations Found	Percentage of Violations Alleged
Terry & Operation Rescue	4	18.2%
Herlihy	1	4.5%
B.O.R.N.	1	4.5%
Lee	4	18.2%
Foreman	2	9.1%
McMonagle	1	4.5%
White	1	4.5%
Talluto	2	9.1%
La Penna	2	9.1%
A. Nathanson	1	4.5%
Pearson	1	4.5%

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[8] Plaintiffs suggest that the Court apportion the phase one fees and costs according to each contemnor's percentage share of the overall fines imposed. Because fines were not imposed for every violation that contemnors were found to have committed, and because successive violations of the Permanent Injunction resulted in a doubling of the fine, the Court believes that the measure it has followed better imposes upon the various contemnors a pro rata share of the attorney's fees and costs incurred as a consequence of their willful violations of the Court's orders.

The $70,889.33 in phase one fees and costs is apportioned as follows:

Contemnor	Percentage	Amount
Terry & Operation Rescue	18.2%	$12,901.86
Herlihy	4.5%	$ 3,190.02
B.O.R.N.	4.5%	$ 3,190.02
Lee	18.2%	$12,901.86
Foreman	9.1%	$ 6,450.93
McMonagle	4.5%	$ 3,190.02
White	4.5%	$ 3,190.02
Taliuto	9.1%	$ 6,450.93
La Penna	9.1%	$ 6,450.93
A. Nathanson	4.5%	$ 3,190.02
Pearson	4.5%	$ 3,190.02

2. *Allocation of Phase Two Fees and Costs*

The Court believes it is appropriate to apportion the phase two attorney's fees and costs among these contemnors involved in those proceedings based on the number of violations they were found to have committed out of the number of violations alleged by plaintiffs.[9] Five (5) distinct violations of

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[9] Plaintiff's suggest that A. Nathanson and Pearson should each be liable for one-third ($^1/_3$) of the phase two fees and costs, and do not seek compensation for the remaining one-third ($^1/_3$) attributable to B. Nathanson. The Court, however, believes it is more equitable to apportion the fees and costs, according to the violations proved by plaintiffs, rather than the number of respondents involved, as this method reflects that A. Nathanson and Pearson were successful in defending against the allegations that they violated the May 4 Order.

the Court's orders were at issue during phase two, two (2) violations each charged to A. Nathanson and Pearson, and one (1) violation charged to B. Nathanson. Inasmuch as A. Nathanson and Pearson were each adjudged in contempt on one violation, the each must bear one-fifth ($^1/_5$) or twenty percent (20%) of the total phase two attorney's fees and costs incurred by plaintiffs.

The Nathansons argue that the total phase two award should not include attorney's fees expended with regard to the **[1366]** unsuccessful motion for sanctions asserted by plaintiffs against the Nathansons' attorney. The Court agrees. Accordingly, the phase two attorney's fees will be reduced by 21.4 hours, the time spent by Alison Wetherfield in drafting that motion, leaving a total request for phase two of $46,760.17. These phase two fees are apportioned as follows:

Contemnor	Percentage	Amount
A. Nathanson	20%	$9,352.03
Pearson	20%	$9,352.03

Accordingly, the total share of the fees and costs incurred during phase one and phase two for which A. Nathanson and Pearson are each liable is $12,542.05.

C. *Washburn's Motion to Vacate the Imposition of Rule 11 Sanctions*

The Court found that Washburn's conduct in resubmitting a cross-motion to dismiss which had previously been rejected by the Court, after having been repeatedly warned that the resubmission of the cross-motion without additional support would expose him to the risk of Rule 11 sanctions, was vexatious and warranted sanctions. February 27 Opinion 732 F.Supp. at 412.

Washburn argues that an evidentiary hearing was required before sanctions could be imposed in order to test the extent of his inquiry into the legal positions the Court found to be frivolous. From this argument it is apparent that he misconstrues the basis for the imposition of sanctions. While the Court did find that many of the arguments he raised in the cross-motion to dismiss were manifestly frivolous, Rule 11 sanctions were not imposed for the filing of the original cross-motion, but only for the resubmission of the cross-motion without additional for support. After the initial cross-motion was denied Washburn was explicitly warned that sanctions might result if he further burdened plaintiffs and the Court by resubmitting the cross-motion without additional support. No disputed factual issues were involved in determining whether the resubmission of the motion violated an objective standard of reasonableness. Thus, an evidentiary hearing was not required.

Washburn also maintains that the imposition of sanctions should be vacated because the Rule 11 motion was (1) withdrawn by plaintiffs, (2) prematurely filed, and (3) improperly served. None of these arguments have merit, and the Court will address them only briefly.

In a letter to the Court, dated November 8, 1989, plaintiffs' counsel responded to Washburn's Memorandum and Affidavit in Opposition to the Rule 11 motion.[10] Washburn asserts that, in this letter, plaintiff's sought to withdraw their Rule 11 motion and therefore the Court should not have ruled on

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[10] Washburn's submissions in opposition to the Rule 11 motion were received by the Court, first in handwritten and then in typed form, during October and November 1989, and the Court considered and rejected the arguments raised therein prior to imposing Rule 11 sanctions.

it. A fair reading of the letter, however, provides no support for such a conclusion. To the contrary, it is clear that the letter was intended to serve as plaintiffs' reply to the opposition papers Washburn had filed, and that plaintiffs' were not seeking to withdraw their Rule 11 motion.[11]

In fact, the letter set forth the return date of the Rule 11 motion and indicated that no oral argument was requested or scheduled to occur. Plaintiffs, in concluding the letter, responded to Washburn's argument that the Rule 11 motion was prematurely filed because the Court had not yet found the resubmission of the motion to be frivolous, by requesting that "the Court first consider Mr. Washburn's re-[1367]newed motion and then plaintiff's motion for sanction." This, of course, reflected only an acknowledgment of the process which the Court would necessarily follow prior to ruling on the Rule 11 motion, and in no way altered the fact that the parties had a full opportunity to present their arguments regarding the Rule 11 motion, and did present these arguments in their submissions to the Court.

Finally, Washburn's motion to vacate the imposition of sanctions indicates that he was properly served with the Rule 11 motion, and any complaints that other parties may have regarding service of the Rule 11 motion are inapposite.

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[11] That plaintiffs wished to continue to pursue their Rule 11 motion is clear from the opening lines of the letter, where plaintiffs explain that they "wish to rest on the legal arguments in their memorandum dated September 22, 1989" and "write this letter only to clarify confusions raised by Attorney Washburn's Rule 11 Memorandum and Affidavit in Opposition."

Thus, there is no basis for the Court to vacate the imposition of Rule 11 sanctions, and Washburn's motion is denied.

1. *The Amount of the Sanction*

The Court imposed Rule 11 sanctions against Washburn in the amount of the attorney's fees and costs reasonably incurred by plaintiffs in responding to his renewed cross-motion to dismiss and in filing their motion for sanctions. February 27 Opinion at 50. Plaintiffs seek $11,712.47 for fees and costs.[12] They have detailed these expenses in their application for attorney's fees against the contemnors, and Washburn has not challenged the number of hours expended, the rates sought by the attorneys involved, or the overall reasonableness of the amount requested. Inasmuch as plaintiffs have adequately documented their time and expenditures, the Court will not modify the amount requested. *Cf. Northeast Women's Center v. McMonagle, supra,* 889 F.2d at 477. Thus, Washburn is liable to plaintiffs for $11,712.47 in attorney's fees and costs as a sanction under Rule 11.

CONCLUSION

Plaintiffs are prevailing parties under 42 U.S.C. § 1988 entitled to an award of attorney's fees and costs from defendants. Their motion for attorney's fees under section 1988 is granted to

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[12] Plaintiffs seek to recover for seven hours of work by Wetherfield, 39.25 hours of work by Gundrum, and 21 hours of work by attorney Elizabeth Malcolm ("Malcolm"), a volunteer attorney at the NOW Legal Defense and Education Fund. Plaintiffs request an hourly rate of $110 for Malcolm's time, which is consistent with the prevailing marketplace rates for attorneys with comparable experience in private practice.

the extent that defendants are liable for $153,211.50 in attorney's fees and $4,294.31 in costs. Plaintiff's fee application against the various contemnors pursuant to the Court's February 27 Opinion is granted to the extent that fees and costs are awarded against the various contemnors in the following amounts:

Terry & Operation Rescue	$12,901.86
Herlihy	$ 3,190.02
B.O.R.N.	$ 3,190.02
Lee	$12,901.86
Foreman	$ 6,450.93
McMonagle	$ 3,190.02
White	$ 3,190.02
Talluto	$ 6,450.93
La Penna	$ 6,450.93
A. Nathanson	$12,542.05
Pearson	$12,542.05

Washburn's motion to vacate the imposition of Rule 11 sanctions against him is denied. Washburn is liable to plaintiffs for $11,712.47 in attorney's fees and costs incurred as a result of his conduct in violation of Rule 11.

Settle orders on notice.

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN, et al.,

Plaintiffs,

: ORDER

CITY OF NEW YORK,

Plaintiff-Intervenor,

: 88 Civ. 3071 (RJW)

-and-

UNITED STATES OF AMERICA,

Judgment Creditor,

-against-

RANDALL TERRY, et al.,

Defendants.

Plaintiff's Order to Show Cause as to why certain named defendants and respondents should not be found in civil contempt of this court's orders, which was filed June 9, 1989, came on for hearing before the Court, Honorable Robert J. Ward, District Judge, presiding, and the issues having been duly heard on August 9, 10, 15 and 16, 1989 and a decision having been rendered on February 27, 1990.

IT IS ORDERED that the United States of America, as Judgment Creditor, recover of defendants and respondents as follows:

Defendants Randall Terry and Operation Rescue are adjudged in civil contempt of this Court's October 27 Order and Permanent Injunction and are assessed coercive civil penalties in the amount of $100,000. Defendant Thomas Herlihy is adjudged in civil contempt of this Court's May 4 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Bistate Operation Rescue Network ("B.O.R.N.") is adjudged in civil contempt in this Court's October 27 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Jesse Lee is adjudged in civil contempt of the Court's May 4 Order, October 27 Order and Permanent Injunction and assessed coercive civil penalties in the amount of $100,000. Respondent Joseph Foreman is adjudged in civil contempt of the Court's Permanent Injunction and assessed coercive civil penalties in the amount of $25,000. Respondents Michael McMonagle and Jeff White are adjudged in civil contempt of the Court's Permanent Injunction and assessed coercive civil penalties in the amount of $25,000. Respondent Michael LaPenna is adjudged in civil contempt of the Court's May 4 Order and October 27 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Florence Talluto is adjudged in civil contempt of the Court's October 27 Order and Permanent Injunction and assessed coercive civil penalties in the amount of $50,000. Respondent Adelle Nathanson is adjudged in civil contempt of the Court's October 27 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Robert Pearson is adjudged in

civil contempt of the Court's Permanent Injunction and assessed coercive civil penalties in the amount of $25,000.

Dated: New York, New York
May 8th, 1990

/s/ ROBERT J. WARD
Robert J. Ward

U.S. District Court Judge

APPENDIX I

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN; New York City Chapter of the National Organization for Women; National Organization for Women; Religious Coalition for Abortion Rights-New York Metropolitan Area; New York State National Abortion Rights Action League, Inc.; Planned Parenthood of New York City, Inc.; Eastern Women's Center, Inc.; Planned Parenthood Clinic (Bronx); Planned Parenthood Clinic (Brooklyn); Planned Parenthood Margaret Sanger Clinic (Manhattan); OB-GYN Pavilion; The Center for Reproductive and Sexual Health; VIP Medical Associates; Bill Baird Institute (Suffolk); Bill Baird Institute (Nassau); Dr. Thomas J. Mullin; Bill Baird; Reverend Beatrice Blair; Rabbi Dennis Math; Reverend Donald Morlan; and Pro-Choice Coalition, Plaintiffs,

and

City of New York, Plaintiff-Intervenor,

v.

Randall TERRY; Operation Rescue; Reverend James P. Lisante; Thomas Herlihy; John Doe(s) and Jane Doe(s), the last two being fictitious names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein, Defendants.

No. 88 Civ. 3071 (RJW).
United States District Court,
S.D. New York,
Feb. 27, 1990.

[392][1] Center for Constitutional Rights (David Cole, Mary M. Gundrum and Rhonda Copelon, of counsel), Now Legal Defense and Educ. Fund (Alison Wetherfield and Sarah Burns, of counsel), and Rabinowitz, Boudin, Lieberman, Standard and Krinsky, P.C. (Judith Levin, of counsel), New York City, for plaintiffs.

Corp. Counsel for the City of New York (Peter Zimroth, Hilary Weisman and Lorna Goodman, of counsel), New York City, for plaintiff-intervenor.

Michael E. Tierney, New York City, and Rutherford Institute of Connecticut, Inc. (Joseph P. Secola, George J. Mercer, of counsel), Milford, Conn., for defendants.

A. Lawrence Washburn, Albany, N.Y., for defendants and respondents Florence Talluto, Michael McMonagle, Michael LaPenna and Jeff White.

John J. Broderick, Syosset, N.Y., for respondent Jesse Lee.

Kevin P. McGovern, Brooklyn, N.Y., for respondent Joseph Foreman.

Putney, Twombly, Hall & Hirson (John P. Hale, of counsel), New York City, for respondents Adelle and Bernard Nathanson.

Hogan & Traynor (Richard J. Traynor, of counsel), Morristown, N.J., for respondent Robert Pearson.

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[1] Bracketed numbers indicate page numbers from decision reported at 732 F. Supp. 388.

ROBERT J. WARD, District Judge.

Plaintiffs moved by order to show cause to hold certain defendants and other individuals and organizations acting in concert [393] with those defendants (collectively "respondents") in civil contempt of court for violating the temporary restraining order, the preliminary injunction and/or the permanent injunction in this action. These orders prohibited blocking access to medical facilities which performed abortions. Plaintiffs also seek to recover the costs and attorneys fees they incurred in bringing this contempt motion. A myriad of related motions have been filed by the parties to this proceeding and a previously denied cross-motion to dismiss the motion for contempt has been renewed by certain respondents. In response, plaintiffs filed a motion for the imposition of Rule 11 sanctions against attorney A. Lawrence Washburn ("Washburn"), claiming that the renewed cross-motion is frivolous. Plaintiffs also filed a motion to strike a portion of the record in the hearing conducted by the Court in these contempt proceedings, and for the imposition of sanctions pursuant to 28 U.S.C. § 1927, against attorney John P. Hale ("Hale"), counsel for respondents Adelle and Bernard Nathanson.

For the reasons that follow, the motion to hold defendants and respondents in civil contempt is granted in part and denied in part, the renewed cross-motion to dismiss is denied, the motion for the imposition of Rule 11 sanctions against Washburn is granted, and the motion to strike the record and impose sanctions on Hale is granted in part and denied in part.

BACKGROUND

Plaintiffs commenced this action in New York State Supreme Court on April 25, 1988, seeking injunctive and

declaratory relief to restrain defendants from blocking access to medical facilities providing abortions.[1] Defendants had organized and publicized a week of protests called "Operation Rescue" to be carried out in the New York City area from April 30 until May 7, 1988. According to defendants' plan, protestors each day would converge on a facility at which abortions were performed in an effort to close down the facility. The target facility each day was not to be disclosed in advance.

By order to show cause, plaintiffs sought to enjoin defendants, for the duration of the planned "Operation Rescue," from obstructing access to any facility at which abortions were performed in New York City and the surrounding counties. On April 28, 1988, a temporary restraining order ("TRO") was issued by Justice Cahn of the New York State Supreme Court, New York County, which did not expressly enjoin Operation Rescue from blocking access to health care facilities. On May 2, as a result of a demonstration in front of a physician's office at 154 East 85th Street in Manhattan where abortions are performed, a second TRO was issued by Justice Cahn that enjoined defendants from "trespassing on, blocking, obstructing ingress into or egress from any facility at which abortions are

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[1] The history of this action is recounted in two prior published opinions of this Court, the first, dated October 27, 1988, and reported at 697 F.Supp. 1324 (1988) (holding defendants Randall Terry and Operation Rescue in civil contempt for violation of the Court's May 4, 1988 order), and the second, dated January 20, 1989, and reported at 704 F.Supp. 1247 (1989) (granting a permanent injunction prohibiting the blocking of access to facilities that perform abortion), as well as in the Second Circuit's opinion, dated September 20, 1989, and reported at 886 F.2d 1339 (2d Cir. 1989) (affirming the Court's various orders in this action as modified to provide that contempt fines were to be paid into the court, not to plaintiffs).

performed in the City of New York, Nassau, Suffolk or Westchester Counties from May 2, 1988 to May 7, 1988."

On May 3, 1988, Operation Rescue, led by Terry conducted a demonstration in front of a clinic in Queens, New York, during which several hundred demonstrators were arrested for blocking ingress to and egress from the clinic. Statement of Stipulated Facts, filed May 4, 1988 ¶¶ 3, 10. On the afternoon of May 3, 1988, Justice Cahn conducted a further hearing on the matter, during the course of which defendants removed the action to this Court. A hearing was scheduled to be conducted before this Court in the late afternoon of the following day, May 4, 1988.

After argument by the parties, this Court ruled on May 4, 1988, that it would adopt and continue Justice Cahn's May 2, [394] 1988 order, and would modify it by (1) adding coercive sanctions of $25,000.00 for each day that defendants violated the terms of the order, and (2) requiring defendants to notify the City in advance of the location of any demonstrations ("the May 4 Order"). This Court also ruled that failure to give such advance notice would make defendants liable for any resulting costs incurred by the City. Defendant Terry was notified of this Court's action by his attorney on the evening of May 4, and the Court signed the May 4 Order the following morning. Second Statement of Stipulated Facts, filed July 19, 1988 ¶ 1.

Defendants moved to vacate the May 4 Order for plaintiffs' alleged failure to comply with Rule 65(c), Fed.R.Civ.P. That motion was denied by this Court on May 6. Also on the same date, the Court of Appeals denied defendants' application for a stay of the May 4 Order pending appeal.

On Thursday morning, May 5, 1988, Operation Rescue demonstrators sat on the sidewalk in front of the Women's

Choice Clinic, where abortions are performed, at 17 W. John Street, Hicksville, Long Island. The demonstrators blocked ingress to and egress from the clinic for approximately three hours. *Id.* ¶ 3.

On Friday morning, May 6, 1988, Operation Rescue demonstrators returned to the same site where they had demonstrated on Monday, May 2, at 154 East 85th Street, Manhattan, once again blocking access to the physician's office. *Id.* ¶ 4. Defendant Terry personally participated in physically blocking access to the abortion facility during the May 6 demonstration and was arrested. Third Statement of Stipulated Facts, filed July 26, 1988 ¶ 5. The terms of the May 4, Order were read aloud by the New York City police before arrests began. *Id.* ¶ 7.

At no time after he received notice of the May 4 Order did defendant Terry direct demonstrators to obey the Order, nor did he at any time alter his prior written instructions to Operation Rescue participants that their goal must be to block access to abortion facilities. *Id.* ¶ 6. Defendant Terry, however, communicated the terms of the Court's May 4 Order to the demonstrators at the May 6, 1988 demonstration. *Id.* Approximately 320 Operation Rescue demonstrators were arrested that day. *Id.* ¶ 7.

On May 31, 1988, plaintiffs sought civil contempt sanctions against defendants pursuant to Rule 70, Fed.R.Civ.P. and 18 U.S.C. § 401 (1982), as a consequence of the events of May 5 and 6. In an Opinion dated October 27, 1988 ("the October 27 Opinion"), the Court granted the motion, denied defendants' cross-motion to dismiss, and adjudged defendants Terry and Operation Rescue in civil contempt of the May 4 Order for their activities during the May 5 and May 6

demonstrations. 697 F.Supp. 1324, 1338. Accordingly, a judgment in the amount of $50,000.00 was entered by the Court holding Terry and Operation Rescue jointly and severally liable for $50,000.00 in civil contempt sanctions to be paid to plaintiff, National Organization for Women ("N.O.W."), and a judgment was entered in the amount of $19,141.00 in favor of the City for the costs that resulted from defendants' failure to provide advance notice of either demonstration. The relief granted in the Court's October 27 Opinion was expressly "without prejudice to plaintiffs' right to proceed against defendants Herlihy and Lisante, or against any other individuals who violated the Court's Order with notice." 697 F.Supp. at 1338.

On October 7, 1988, plaintiffs moved to modify the Court's prior injunction to cover the dates October 28, 29 and 31, 1988, in response to defendants' publicized plan to conduct a "National Day of Rescue" at the end of October. At the conclusion of an evidentiary hearing conducted on October 25 and 27, 1988, the Court granted plaintiffs' motion and signed an order granting plaintiffs the modified preliminary relief they sought ("the October 27 Order"). Defendants' applications to this Court and to the Court of Appeals for a stay pending appeal of the October 27 Order were denied.

Notwithstanding the issuance of the modified preliminary injunction on October 27 and the denial of the requested stay, Operation Rescue organized and conducted [395] two demonstrations on the morning of October 29, 1988, within the geographical area covered by the October 27 Order. From at least 8:00 a.m. until about 12:15 p.m. on October 29, approximately 250 Operation Rescue demonstrators blocked ingress to and egress from the Women's Pavilion medical clinic on Ashford Avenue in Dobbs Ferry, New York. Exhibits A, H & I, annexed to Affirmation of Mary M. Gundrum, filed December 21, 1988 ("Gundrum Aff."); Exhibit 37, annexed to

Declaration of Mary Gundrum, filed June 9, 1989 ("Gundrum Decl."). From at least 8:00 a.m. until about noon on October 29, approximately 130 Operation Rescue demonstrators blocked access to the Women's Pavilion medical clinic on Deer Park Avenue in Deer Park, Suffolk County, New York. Exhibits A & J, annexed to Gundrum Affidavit; Exhibit 37, annexed to Gundrum Decl. Both clinics provide abortions and family planning counseling.

On December 21, 1988, plaintiffs moved for summary judgment and a permanent injunction upon receiving notice of blockades planned by Operation Rescue in the New York City area from January 12 to 14, 1989. These blockades had been organized in express retaliation for this Court's October 27 Opinion. 697 F.Supp. 1324. *See* Exhibit A, annexed to Gundrum Aff. (Letter from Randall Terry, dated November 16, 1988, urging participation in January blockades of "abortion mills" in the New York City area in order to "face down" this Court). On January 6, 1989, the Court heard oral argument on plaintiffs' motion for summary judgment and defendants' motion to dismiss and, on January 10, 1989, the Court issued a permanent injunction that again enjoined defendants from blocking access to medical facilities offering abortion and included coercive sanctions of $25,000 per day for violations of the order (the "Permanent Injunction"). The Permanent Injunction was modified from the previous orders to provide that each successive violation of the injunction would result in doubling the civil contempt sanction applicable to the contemnor.

Notwithstanding the issuance of the Permanent Injunction, once again Operation Rescue organized and led demonstrations which blocked access to clinics offering abortion. On January 13, 1989, Terry and other Operation Rescue leaders led several hundred persons to block access to and from the Margaret Sanger Planned Parenthood Clinic at 380 Second

Avenue in Manhattan, a facility that performs abortions (the "Margaret Sanger Clinic"). Exhibits 17 & 26, annexed to Gundrum Decl. Police Inspector James Helbock read the permanent injunction to the demonstrators using a bullhorn, before approximately 275 demonstrators were arrested. Exhibit 26, annexed to Gundrum Decl. Terry, using a bullhorn as well, instructed demonstrators to lock arms and prevent police officers from reaching the building entrance, and to engage in "total, complete non-cooperation" with the police. *Id.*

On January 14, 1989, Operation Rescue demonstrators again blocked all access to the Margaret Sanger Clinic. As happened during the previous day's demonstration, police officers read the Permanent Injunction to the demonstrators blocking access to the clinic before beginning arrests. Exhibits 28, 31, 26, 30 & 29, annexed to Gundrum Decl. Also on January 14, 1989, demonstrators blocked access to five other clinics in the New York City area which provide abortions. These demonstrations occurred at (1) the Manhattan Women's Medical Clinic, located at 115 East 23rd Street in Manhattan; (2) the VIP Medical Associates Clinic, located at 72 Fifth Avenue in Manhattan; (3) the Lincoln Women's Service Clinic, located at 1995 Broadway, Manhattan; (4) the Park Med Clinic, located on the 12th floor of 475 Park Avenue South in Manhattan; (5) the Eastern Women's Center, located at 38 East 30th Street in Manhattan. Exhibits 1, 31, 18, 33, 30, 29 & 21, annexed to Gundrum Decl. Operation Rescue claimed responsibility for organizing and conducting these demonstrations in literature it disseminated to its participants. Exhibit 1, annexed to Gundrum Aff.

On January 20, 1989, the Court issued an opinion granting plaintiffs' motion for summary judgment on their common law trespass [396] claim and on their 42 U.S.C. § 1985(3) federal cause of action and permanently enjoining

Operation Rescue and its participants from blocking ingress into and egress from medical facilities providing abortion related services ("the January 20 Opinion").

Defendants appealed from the various orders entered by this Court. The Court of Appeals, in an Opinion dated September 20, 1989, affirmed this Court's ruling which, *inter alia*, (1) enjoined defendants from blocking access to clinics offering abortions, (2) held Terry and Operation Rescue in contempt of violation of the May 4 Order, and (3) imposed discovery sanctions on defendants. 886 F.2d 1339. The Court's ruling regarding payment of the civil contempt sanctions was modified to provide that the coercive penalties for violations of the orders be payable into the Court, not to plaintiff N.O.W. 886 F.2d at 1353.

The instant motion for contempt

Plaintiffs' application for contempt relates to four days of blockades of facilities performing abortions: May 6, 1988, October 29, 1988, January 13, 1989, and January 14, 1989. Plaintiffs seek contempt sanctions against the following organizations and persons:

Defendants:

Operation Rescue
Randall Terry ("Terry")
Thomas Herlihy ("Herlihy")

Respondents:[2]

Bistate Operation Rescue Network ("B.O.R.N.")
Jesse Lee ("Lee")
Joseph Foreman ("Foreman")
Michael McMonagle ("McMonagle")
Jeff White ("White")
Michael LaPenna ("LaPenna")
Florence Talluto ("Talluto")
Adelle Nathanson ("A. Nathanson")
Bernard Nathanson ("B. Nathanson")
Robert Pearson ("Pearson")

No facts were disputed by any of defendants, nor by respondents B.O.R.N., Lee, Foreman, McMonagle, White,

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2 Two additional individuals, Dan Brusstar and John Hinshaw, were named in the Order to Show Cause as respondents, but were not included in plaintiffs' proof of service, filed July 13, 1989, and plaintiffs no longer argue that these individuals are subject to the instant contempt proceeding.

Christopher Slattery ("Slattery"), another individual originally named in the Order to Show Cause, was later served with a subsequent Order to Show Cause to hold him in civil contempt. Slattery has disputed certain facts concerning his alleged violation of the Court's orders, and this matter is currently pending before the Court.

LaPenna and Talluto.[3] Respondents B. Nathanson, A. Nathanson and Pearson, disputed the alleged facts concerning their knowledge of the Court's orders and their involvement in blocking access to clinics in concert with defendants. The Court commenced a hearing regarding the disputed facts on August 9, 1989. On August 9, 10, 15 and 16, 1989, the Court heard testimony and received evidence concerning the alleged roles these three respondents played in blocking access to clinics in concert with defendants and in violation of the Court's orders.

The Court will first discuss the appropriateness of imposing contempt sanctions against defendants and the objections they raise to these contempt proceedings. Second, the Court will examine the appropriateness of imposing sanctions against the various respondents. Third, the Court will consider the plaintiffs' request for attorneys' fees and costs associated with this application. Finally, the Court will address the motions for sanctions against attorneys Washburn and Hale.

[397] DISCUSSION

The Court of Appeals, in its decision in this case, clearly outlined the applicable law governing civil contempt proceedings.

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3 Ordinarily a hearing is required before a court may award civil contempt sanctions. Where there are no material facts in dispute, however, no hearing is necessary. *United States v. City of Yonkers*, 856 F.2d 444, 453 (2d Cir. 1988) (need for plaintiffs to present evidence establishing defendants' contempt was obviated by undisputed representation that defendants had violated court's order); *Parker Pen Co. v. Greenglass*, 206 F.Supp. 796, 797 (S.D.N.Y. 1962); 11 C. Wright & A. Miller, *Federal Practice and Procedure, Civil* § 2960, at 590 (1973).

> A court's inherent power to hold a party in civil contempt may be exercised only when (1) the order the party allegedly failed to comply with is clear and unambiguous, (2) the proof of noncompliance is clear and convincing, and (3) the party has not diligently attempted in a reasonable manner to comply.

886 F.2d at 1351; *E.E.O.C. v. Local 638, Local 28 of the Sheet Metal Workers' Int'l Ass'n*, 753 F.2d 1172, 1178 (2d Cir. 1985) *aff'd*, 478 U.S. 421, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986). It is not necessary to show that the party disobeyed the court's order willfully. *E.E.O.C. v. Local 638, Local 28 of the Sheet Metal Workers' Int'l Ass'n, supra*, 753 F.2d at 1178.

A. *Defendants*

The Court of Appeals, in upholding this Court's determination that Operation Rescue and Terry had violated the May 4 Order, rejected defendants' contention that the order was impermissibly vague.

> The [May 4 Order] was sufficiently clear as to what acts were proscribed. It prohibited trespass and obstruction that had the effect of blocking "ingress to and egress from any facility at which abortions are performed" within a specific geographic area. It barred physical abuse and tortious harassment of patients and employees. These prohibitions were balanced by language expressly permitting sidewalk counseling in a reasonably quiet and nonthreatening manner. [citation omitted] The conduct that lay between that which was prohibited and that which was

> permitted was sufficiently clear for defendants to ascertain precisely what they could and could not do. Therefore, the order was specific enough to serve as the foundation for a contempt citation.

886 F.2d at 1352.

The language of the October 27 Order and the Permanent Injunction pertaining to defendants' proscribed and permitted conduct was essentially unaltered from the language of the May 4 Order. Accordingly, these orders are sufficiently clear and unambiguous to satisfy the first prerequisite for a contempt citation against defendants.

Defendants challenge the propriety of conducting these contempt proceedings on three grounds. First, they assert that the Court lacks jurisdiction to enforce its orders because these order were pending on appeal at the time the contempt proceedings were commenced. To the extent that defendants maintain this argument after the Court of Appeals decision, it is meritless.

Plaintiffs' instant application for contempt does not require the Court to reconsider, reexamine, or alter any of its prior orders, as this application has never before been presented to the Court. Defendants sought and were denied several stays pending appeal. Having failed to obtain a stay, defendants cannot now argue that the Court is without power to enforce its own orders until the Court of Appeals has addressed their validity. *See National Service Industries, Inc. v. Vafla Corp.*, 694 F.2d 246, 250 (11th Cir. 1982) (argument that plaintiff may not execute upon judgment because case was on appeal, where defendants did not obtain a stay pending appeal, bordered on the frivolous).

Second, defendants reassert their previously rejected argument that plaintiffs' motion for contempt is criminal, not civil, in nature because they allege it seeks to punish them for past conduct. This argument, resoundly repudiated by the Court of Appeals when put forth regarding the prior contempt proceedings against Operation Rescue and Terry, *see* 886 F.2d at 1351, is equally unavailing in these proceedings.

The demarcation between civil and criminal contempt is well-established. A sanction imposed to compel obedience to a lawful order of the court or to provide compensation to a complaining party is civil; a sanction imposed to punish for an offense against the public and to vindicate the authority of the court - not to provide private [398] benefits or relief - is criminal in nature. *Id.*

In each instance in which defendants are charged with knowing violation of the Court's orders, the particular order, including the coercive sanctions embodied within it, was issued prior to the alleged violative conduct. The May 4 Order, the October 27 Order and the Permanent Injunction forewarned defendants of the consequences of their actions should they choose to defy the Court's authority and block access to facilities which perform abortions in the New York City area. The ability to avoid the consequences of a violation of these orders was completely within the control of defendants, who had ample

opportunity to comply with their prohibitions.[4] The prospectively fixed penalties in each case were entirely conditional and coercive, plainly intended to coerce compliance with the Court's orders and to preserve the parties' then-existing rights. Therefore, the Court concludes that defendants activities on May 6, 1988, October 29, 1988, and January 13 & 14, 1989, are subject to civil contempt sanctions imposed by the Court in its May 4 Order, October 27 Order, and Permanent Injunction, respectively.

Defendants' final argument is that the Court should recuse itself pursuant to 28 U.S.C. § 455(b)(1) because, by chance, it observed part of the January 14, 1989 demonstration at the Margaret Sanger Clinic. Defendants argue that this observation raises the appearance of partiality by the Court.

Section 455(b)(1) provides that a judge "shall disqualify himself ... [w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."

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[4] As the Court of Appeals explained in upholding the prior contempt finding against Operation Rescue and Terry:

> Faced on May 5, 1988 with a choice between compliance or noncompliance with the district Court's order, defendants chose the latter course.
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> The factual determination of noncompliance - the assessment of whether the standards showing contempt were satisfied - and the resulting imposition of fines necessarily occurred after the defendants' ample opportunity to comply had come and gone. Thus, since the sanctions were imposed to compel obedience to a court order they are civil in nature.

886 F.2d at 1351.

The Court informed all parties, on the record, of its limited observations of this demonstration, made while the Court was coincidentally attending to private matters in the vicinity. *See* Transcript of Hearing, conducted June 9, 1989, at 6-9. The Court's observations did not include the identification of any specific group or individual among the demonstrators. *Id.* Because the fact that a demonstration occurred outside the Margaret Sanger Clinic on January 14, 1989 is not disputed by either defendants or respondents, there is simply no basis upon which to justify refusal under section 455(b)(1).

The objections raised by defendants with respect to the Court's ability to render a decision on the civil contempt application are rejected. The Court now turns to the undisputed facts to determine whether civil contempt sanctions shall be imposed.

Plaintiffs assert that Operation Rescue and Terry are each liable for $100,000.00 due to violations of the Court's October 27 Order and Permanent Injunction. This amount is derived as follows: (1) $25,000 for the demonstrations in violation of the October 27 Order at Deer Park and Dobbs Ferry, New York, on October 29, 1988; (2) $25,000 for the demonstration in violation of the Permanent Injunction at the Margaret Sanger Clinic on January 13, 1989, and (3) $50,000 for the demonstrations in violation of the Permanent Injunction at six New York City area clinics on January 14, 1989. Plaintiffs also assert that Herlihy is liable for $25,000 due to his participation in the demonstration in violation of the May 4 Order at 154 East 85th Street, Manhattan, on May 6, 1988.

1. Operation Rescue and Terry

The undisputed facts presented by plaintiffs indicate that all of the demonstrations [300] at issue in these contempt

proceedings were initiated and coordinated by Operation Rescue. Operation Rescue literature and Terry called for a National Day of Rescue on October 29, 1988, and reported both the Dobbs Ferry and Deer Park demonstrations as part of the National Day of Rescue. Exhibits A & B, annexed to Gundrum Aff.; Exhibit 37 annexed, to Gundrum Decl. Both Operation Rescue literature and Terry invited supporters to participate in the January demonstrations in New York City, and Operation Rescue literature subsequently claimed responsibility for these demonstrations. On January 12, 1989, two days after the issuance of the Permanent Injunction, a transcript of a television news show captured Terry talking with reporters regarding the next day's planned demonstration. Exhibit 23, annexed to Gundrum Decl. Terry coordinated and directed the demonstrators at the January 13, 1989 blockade, and instructed demonstrators to refuse to cooperate with the police. Exhibits 18, 20, 21, 19, 17 & 26, annexed to Gundrum Decl. On January 14, 1989, Terry once again led demonstrators to block access to the Margaret Sanger Clinic. Exhibit 21, annexed to Gundrum Decl. As the Court explained in its October 27 Order, Terry, as leader and organizer of Operation Rescue, is liable for civil contempt sanctions by virtue of his failure to alter his instructions to Operation Rescue participants that their goal was to block access to abortion facilities. As leader of the organization and of the particular activities that were enjoined, Terry had an affirmative duty to attempt to secure compliance by his rank and file. 697 F.Supp. at 1331. This duty was ignored by his purposeful conduct designed to violate the Court's orders and to encourage others to do so as well. *See* Exhibit A, annexed to Gundrum Aff. It is clear that Terry and Operation Rescue were not reasonably diligent in attempting to achieve compliance with the Court's orders. Indeed, the evidence demonstrates that Operation Rescue and Terry were diligent only in acting in direct contravention of these orders.

The undisputed facts are more than sufficient to satisfy plaintiffs' burden of proving by clear and convincing evidence that Operation Rescue and Terry violated the October 27 Order and the Permanent Injunction. Accordingly, Operation Rescue and Terry are each adjudged in civil contempt of the October 27 Order and the Permanent Injunction and are assessed coercive civil penalties, jointly and severally, in the amount of $100,000.

2. Herlihy

The undisputed facts establish that Herlihy participated in the May 6, 1988 demonstration and was arrested for blocking access to the physician's office, after rejecting the opportunity afforded by police to leave the area and comply with the May 4 Order. Plaintiffs assert Herlihy was personally served with the May 4 Order during the demonstration. Personal service of an order upon a party to an action, however, is not required. Parties are charged with a duty to monitor the progress of their cases and to ascertain the terms of any order entered against them. *Dole Fresh Fruit Co. v. United Banana, Inc.*, 821 F.2d 106, 109 (2d Cir. 1987); *Perfect Fit Inds., Inc. v. Acme Quilting Co.*, 646 F.2d 800, 808-09 (2d Cir. 1981). In addition, the May 4 Order was read by police to the demonstrators before police began making arrests. The evidence clearly and convincingly establishes that Herlihy knowingly violated the May 4 Order. Therefore, Herlihy is liable for coercive civil contempt sanctions in the amount of $25,000.

B. *Respondents*

Rule 65(d), Fed.R.Civ.P. provides an injunctive order of the court "is binding only upon the parties to the action; their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or

otherwise." Rule 65(d) prevents defendants from carrying out prohibited activity through others who have actual notice of the court's orders. *Regal Knitwear v. N.L.R.B.*, 324 U.S. 9, 14, 65 S.Ct. 478, 481, 89 L.Ed. 661 (1945). Thus, civil contempt sanctions may be assessed [400] against nonparties who had actual notice of the orders in effect at the time in question and participated with defendants in violating those orders.

Respondents repeat the objections raised by defendants - that this Court lacks jurisdiction to preside over these contempt proceedings and that the imposition of sanctions against them for knowing violation of the Court's orders would be tantamount to criminal, not civil, contempt. Both arguments are rejected for the reasons stated in the previous section.[5]

Respondents also attack the validity of the underlying orders in this action by arguing that the Court's conclusion that plaintiffs presented a claim under 42 U.S.C. § 1985(3) was in error. This argument was rejected by this Court and Court of

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[5] If respondents had notice of the Court's orders, they stood in the same position as defendants with respect to their ability to avoid civil contempt sanctions by simply not violating these orders while acting in concert with defendants. The prospective sanctions in the orders were coercive and conditional as applied to respondents with actual notice, designed to secure future compliance. Thus, they are civil contempt fines. *See* 886 F.2d at 1351. Respondents' brash assertion that they should be allowed to act in concert with defendants in order to intentionally violate a court order which they had actual notice, while retaining impunity from the imposition of coercive sanctions fashioned to assure compliance with the order, is as groundless as it is insolent. Their repeated attempts to characterize this proceeding as one for criminal contempt conveniently ignore the numerous opportunities those respondents with actual notice of the orders had to comply with them, and thereby avoid any civil contempt penalties.

Appeals when raised by defendants, and is similarly without substance when voiced by respondents. *See* 886 F.2d at 1357-61, 704 F.Supp. at 1260. Therefore, even if respondents were in a position to challenge the validity of the underlying orders during a contempt proceeding against them, their challenge poses no impediment to imposing sanctions, if sanctions are warranted by their conduct. *See Donovan v. Sovereign Sec., Ltd.*, 726 F.2d 55, 60 (2d Cir. 1984) (contemnors may not attack validity of underlying orders during contempt proceedings against them.).

Respondents offer a number of challenges to service of the Order to Show Cause for entry of summary judgment holding them in contempt. Personal service was effectuated upon respondents B.O.R.N., Lee, Foreman, White and B. Nathanson; "leave and mail" service was effectuated upon respondents McMonagle and Pearson, using the form of mail directed by the Court in the Order to Show Cause; and service was effectuated by Federal Express mailing as authorized by the Court in the Order to Show Cause upon respondents LaPenna, Talluto, and A. Nathanson. *See* Proof of Service of Order to Show Cause, filed June 13, 1989.

Respondents LaPenna and Talluto challenge this Court's provision in the Order to Show Cause that, if "plaintiffs are unable to effect personal service after two attempts, they may serve respondents at their last known address by Federal Express." This provision was perfectly proper.[6]

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[6] A. Nathanson offered no challenge to the manner of service of the Order to Show Cause, filed opposition to the motion for contempt, and took part in the evidentiary hearing concerning her alleged violation of the Court's orders. Thus, she waived any objection to the service of the Order to Show Cause. *See* Rule 12(b)(5), Fed.R.Civ.P.; *Merz v. Hemmerle*, 90 F.R.D. 566, 568 (E.D.N.Y. 1981) (citing cases).

Rule 4(c)(2)(C)(i), Fed.R.Civ.P., allows service upon individuals "pursuant to the law of the state in which the district court is held...." *See Leab v. Streit*, 584 F.Supp. 748, 758-61 (S.D.N.Y. 1984). In New York State, service is permitted to be effected "in such manner as the court, upon motion without notice directs, if service is impracticable under paragraphs one [personal service], two [leave and mail service] and four [nail and mail service] of this section." New York State Civil Practice Law and Rules ("C.P.L.R.") § 308(5).

C.P.L.R. § 308(5) requires a showing of impracticability of other means of service, but does not require proof of due diligence or of actual prior attempts to serve a party under each and every method provided in the statute. *See Tremont Federal Savings* **[401]** *and Loan Assoc. v. Ndanusa*, 144 A.D.2d 660, 661, 535 N.Y.S.2d 8, 9 (2d Dep't 1988); *Saulo v. Nouni*, 119 A.D.2d 657, 658, 501 N.Y.S.2d 95, 97 (2d Dep't 1986); *Liebeskind v. Liebeskind*, 86 A.D.2d 207, 210, 449 N.Y.S.2d 226, 229 (1st Dep't 1982), *aff'd*, 58 N.Y.2d 858, 460 N.Y.S.2d 526, 447 N.E.2d 74 (1983). The meaning of "impracticability" is not capable of easy definition, and will depend upon the facts and circumstances of the particular case. *Markoff v. South Nassau Community Hospital*, 91 A.D.2d 1064, 1065, 458 N.Y.S.2d 672, 673 (2d Dep't 1983) (single attempt at service without any supporting documentation that service might be impracticable was insufficient to sustain service under section 308(5)). *See also Hitchcock v. Pyramid Centers of Empire State Co.*, 151 A.D.2d 837, 542 N.Y.S.2d 813 (3d Dep't 1989) (same).

In this case, plaintiffs were faced with the task of serving numerous nonparty respondents with an Order to Show Cause for a proceeding seeking to hold them in contempt and impose sanctions upon them. Evidence was presented by plaintiffs of

the practical difficulties they would encounter in effectuating such service because of respondents' demonstrated disregard for the authority of the Court, as illustrated by *inter alia*, (1) prior contempt findings by other courts against many of respondents when similar orders enjoining the blocking of access to clinics were intentionally violated, (2) the statements of certain respondents, including Talluto, that they would not honor the Court's orders or pay any penalty for violating laws in relation to their actions in blocking access to clinics, and (3) their actions in blocking access to clinics after the Court's orders had been read. *See* Exhibits 8, 9, 10, 13, 15, 37 & 34, annexed to Gundrum Decl.

The problems encountered with service of an order to show cause for contempt on nonparties have been specifically noted by the courts in New York. As the First Department explained:

> [i]n the particular context of contempts not committed in the immediate presence of the courts, it is frequently the case that those who have flagrantly violated the court's orders are not disposed to make themselves readily available for personal delivery of notice that they are to be prosecuted for contempt of those orders.

Dep't of Housing Preservation and Development v. 24 West 132 Equities, Inc., 137 Misc.2d 459, 462, 524 N.Y.S.2d 324, 327, (1987) *aff'd without opinion*, 150 A.D.2d 181, 540 N.Y.S.2d 711 (1989). The court suggested that the manner of service is sufficient if it is "reasonably calculated under all the circumstances to apprise respondents of the pendency of the

action." *Id.* *See also Saulo v. Noumi*, *supra*, 119 A.D.2d at 658, 501 N.Y.S.2d at 97.

The manner of service authorized in the Order to Show Cause was reasonably calculated to apprise respondents of the pendency of the action, and required plaintiffs to endeavor to make at least two attempts at personal service prior to resorting to the Court sanctioned method of service, thus satisfying the impracticability requirement of section 308(5). *See Dashew v. Cantor*, 85 A.D.2d 619, 620, 445 N.Y.S.2d 24, 25 (2d Dep't 1981) (service under 308(5) authorized when defendant likely to attempt to evade service); *Tremont Federal Savings and Loan Assoc. v. Ndanusa*, *supra*, 144 A.D.2d at 661, 535 N.Y.S.2d at 9.[7]

[402] Next, respondents White and McMonagle challenge the validity of extraterritorial service upon them under Rule 4(f), Fed.R.Civ.P. This argument is confused and misguided. Rule

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[7] Even if the Court were to find that the method of substitute service was not authorized by state law, there would be no need to dismiss the contempt proceedings against these respondents because they have shown absolutely no prejudice from the manner of actual service. Instead, service on La Penna and Talluto would be quashed, and plaintiffs would be directed to serve these respondents anew in one of the other manners set forth in section 308. *See* C. Wright & A. Miller, *Federal Practice and Procedure: Civil § 1354 (1969)*. As respondents have supported their argument by asserting that they are amenable to service, such a course of action would only unjustly delay these contempt proceedings where there is no serious contention that service did not do what it was intended to do, namely, give respondents notice of the pendency of the proceeding. *Cf. Feuntes v. Buser-American, Inc.*, No. 80 Civ. 4965, slip op. (S.D.N.Y. April 8, 1983); *Jones v. Building and Property Rehabilitation*, No. 81 Civ. 950, slip op. (N.D.N.Y. June 25, 1982); *Berhalter v. Irmisch*, 75 F.R.D. 539, 540 (W.D.N.Y. 1977).

4(f) provides for service "within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state." Rule 4(e), Fed.R.Civ.P., provides authority for extraterritorial limits of that state." Rule 4(e), Fed.R.Civ.P., provides authority for extraterritorial service in accordance with the law of the state in which the district court sits in the manner prescribed by state law. *Davis v. Musler*, 713 F.2d 907, 914 (2d Cir. 1983). *See Waffenschmidt v. Mackay*, 763 F.2d 711, 720 (5th Cir. 1985) (court has inherent power to enforce injunctive decrees lest court orders may be flouted, obstructed and violated with impunity, and Rule 4(f) does not bar extra-territorial service of an order to show cause for contempt), *cert. denied*, 474 U.S. 1056, 106 S.Ct. 794, 88 L.Ed.2d 771 (1986). Therefore, under the rubric provided by Rules 4(f) and 4(e), the Court must look to New York law to evaluate the adequacy of service on these respondents.

White and McMonagle do not dispute that they participated in demonstrating in New York, and the Court may exercise jurisdiction over them to determine whether they purposefully violated the Court's orders in concert with defendants. *See Waffenschmidt v. Mackay, supra*, 763 F.2d at 718-19; *Stiller v. Hardman*, 324 F.2d 626, 628 (2d Cir. 1963). New York State Judiciary law § 761 provides for service of an application for civil contempt, and nonresidents over whom the Court has jurisdiction may be served in accordance with the provisions of C.P.L.R. § 308. Plaintiffs complied with the requirements of section 308 by personally serving White and

utilizing leave and mail service upon McMonagle.[8] This challenge to service of the Order to Show Cause is baseless.

Finally, respondents McMonagle, White, LaPenna and Talluto challenge the sufficiency of service of the Order to Show Cause pursuant to Rule 4(j) and 10(b), Fed.R.Civ.P.[9] They argue that they should be considered named defendants in this action because plaintiffs used fictitious names in the complaint to stand for defendants whose identities were unknown. As defendants, this argument continues, they are not bound by the orders of this Court since they were not served with the complaint in the underlying action within 120 days after the case was removed, or the amended complaint was filed. While this argument may be appealing to respondents, from whose vantage point it appears as a safe harbor into which they can sail for protection from their violations of this Court's order, it flies in the face of the law and common sense and must be rejected.

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[8] The fact that the Order to Show Cause was mailed via Federal Express, as opposed to conventional mail, in no way undermines plaintiffs' compliance with the requirements of C.P.L.R. §308.

[9] Rule 4(j) provides, in pertinent part, that:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon ... motion.

Rule 10 provides, in part, that "[i]n the complaint the title of the action shall include the names of all the parties...."

Respondents were nonparties to the underlying action who allegedly acted in concert with defendants in violation of the Court's injunctive orders. Respondents were never named as parties to the underlying action, and are not now parties to that action.[10] The Court can conceive of no basis for equating the anonymous parties listed in the complaint with nonparties who are later alleged to have violated the Court's orders, with notice of these orders, in active concert with defendants. Respondents have offered none. Indeed, it cannot be seriously argued that the Court loses its power to enforce its valid injunctive orders [403] against nonparties acting in concert with defendants simply because more than 120 days pass from the time the complaint in the underlying action was filed. Nor can it be maintained that Rule 4(j) converts every possible contemnor into an indispensable party under Rule 19, Fed.R.Civ.P., who must be joined prior to adjudicating the controversy. Finally, it is absurd to suggest that plaintiffs are forced to do the impossible; foretell which individuals will subsequently act in concert with defendants in violation of an injunctive order of the Court and serve them within 120 days of filing the complaint. Accordingly, Rule 4(j) is completely inapplicable to these respondents.

Respondents have offered no competent evidence disputing actual service of the Order to Show Cause, despite several admonitions from the Court to do so if they wished to continue to challenge the sufficiency of service. No factual affidavits were submitted by respondents. Respondents have not contested that they received actual notice of these proceedings

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10 Plaintiffs' use of fictional names in the complaint to denote unknown potential defendants was perfectly proper under the New York law. *Lowenstein v. Rooney*, 401 F.Supp. 952, 960 (E.D.N.Y. 1975).

and were afforded the opportunity to defend themselves from the claims asserted against them. Therefore, the challenges to the service of the Order to Show Cause are denied. The Court now turns to examine the specific orders as they relate to respondents, and the actions of the various respondents in concert with defendants.

1. The Language of the Orders Relating to Respondents

Plaintiffs assert that respondents Lee, Foreman, LaPenna, Pearson and A. Nathanson are each liable for $25,000 in civil contempt fines due to their blocking access to the physician's office at 154 East 85th Street in Manhattan on May 6, 1988, in concert with defendants and in violation of the May 4 Order.

The wording of the May 4 Order, however, while specifically warning defendants that they would be liable for sanctions in the amount of $25,000 in the event they violated the order, did not clearly extend this sanction to those acting in concert with them. The May 4 Order read, in pertinent part, that:

> defendants' failure to comply with this Order, shall subject them to civil damages of $25,000 per day for any violations of this Order.

The May 4 Order expressly included "all other persons whomever acting in concert with [defendants] with notice of [the] order' in its prohibition on blocking access to clinics. The express inclusion of those acting in concert with defendants was not carried over in providing that coercive sanctions were deemed appropriate as a means of securing compliance with the order. A reasonable reading of the May 4 Order, therefore, might lead to the conclusion that those acting in concert with

defendants were not subject to the $25,000 sanction. The Court does not believe that the May 4 Order was sufficiently clear to give respondents adequate notice that they, as opposed to defendants, would be exposed to the $25,000 coercive penalty.

Accordingly, no fines will be assessed against respondents for their involvement in the May 6 demonstration.[11]

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[11] The unchallenged evidence demonstrates that respondents Lee, Foreman and La Penna acted in concert with defendants in violation of the May 4 Order, with actual notice of the order.

Lee was personally served with a copy of the May 4 Order by police while leading and directing the demonstration and wearing an armband with the inscription "O.R." Third Statement of Stipulated Facts, *supra*, ¶ 7. He was subsequently arrested for blocking access to the facility. *Id.*; Exhibit 36, annexed to Gundrum Decl. Foreman is the Southeast Regional Director of Operation Rescue. Foreman and La Penna participated in the Operation Rescue demonstrations on May 2, 3 and 6, and were arrested on each day. Exhibit 36, annexed to Gundrum Decl. The May 4 Order was read by police to demonstrators on May 6, 1988, and Terry informed the demonstrators of the terms of the May 4 Order. The police offered the demonstrators the opportunity to leave the area and comply with the order after reading the injunction and prior to beginning arrests. Third Statement of Stipulated Facts, *supra*, ¶ 7. This evidence is sufficient to establish that Lee, Foreman and La Penna had notice of the May 4 Order, had the opportunity to avoid violating that order, yet nonetheless acted in concert with defendants to intentionally defy that order. Accordingly, Lee, Foreman and La Penna are adjudged in civil contempt of the May 4 Order.

Both A. Nathanson and Pearson admit being part of the demonstration that blocked access to the office on May 6, 1988 and to being arrested for their activities. They both dispute, however, receiving notice of the May 4 Order. A Nathanson testified that she arrived late and did not hear the police officer or Terry read the May 4 Order to those blocking access to the clinic. Transcript of Argument and Evidentiary Hearing held on July 28, August 9, 10, 15 & 16, 1989 ("Tr."), at 555-557. Similarly, Pearson testified that he arrived late, after the police had read the injunction, but just in time to be arrested for blocking access to the office. Tr. 411, 532-33. The stories told by both respondents in disavowing notice of the May 4 Order were, at best, far-fetched. The disorder associated with arresting the hundreds of demonstrators that day, however, militates

(continued...)

[404] The October 27 Order and the Permanent Injunction remedied the ambiguity in the May 4 Order by explicitly providing that those individuals or organizations operating in concert with defendants with notice of the order would also be liable for coercive sanctions in the amount of $25,000 per day for any violations. For example, the October 27 Order provided that:

> defendants, the officers, directors, agents and representatives of defendants, and all other persons whomsoever acting in concert with them, and with notice of this order (hereinafter "Operation Rescue or National Day of Rescue participants") are:
>
> 1) enjoined and restrained.... ... and it is further
>
> ORDERED that the failure to comply with this Order by any Operation Rescue or National Day of Rescue participant with actual notice of the provisions of this Order shall subject them to civil damages of $25,000 per day for any violations of this Order.

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[11](...continued)

against finding their testimony so incredible as to be unbelievable given that plaintiffs were unable to produce any evidence directly placing either respondents at the demonstration while the injunction was read. Plaintiffs did not meet their burden of establishing that these respondents had notice of the May 4 Order. Accordingly, A. Nathanson and Pearson are not adjudged in civil contempt for their participation in the May 6, 1988 demonstration.

Similarly, the Permanent Injunction defined Operation Rescue participants in the same manner as the October 27 Order, and provided that:

> the failure to comply with this order by any Operation Rescue participant with actual notice of the provisions of this Order shall subject him or her to civil damages of $25,000 per day for the first violation of this Order, and it is further
>
> ORDERED that each successive violation of this Order shall subject the contemnor to civil contempt fine double that of the previous order.

Both provisions more than adequately warn those acting in concert with defendants that they will be subject to civil penalties of $25,000 per day for violations of these orders.[12]

Certain respondents next attack the language of the October 27 Order and the Permanent Injunction, arguing that, because all defendants were not specifically listed in the captions of these orders, the orders did not afford respondents sufficient notice as to when their actions in concert with others would

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[12] Likewise, the Permanent Injunction adequately apprises respondents of the consequences of successive violations of the Order.

expose them to the threat of civil contempt sanctions.[13] This argument is disingenuous. The caption of the October 27 Order includes Terry, Operation Rescue, and Herlihy as named defendants; the caption of the Permanent Injunction lists Terry. There are numerous references throughout both orders to Operation Rescue and Operation Rescue participants, and it is undisputed that Operation Rescue coordinated and conducted [405] the various demonstrations at issue in these contempt proceedings. The terms of the orders with respect to nonparties acting in concert with defendants are more than sufficiently clear, at least with respect to acting in concert with Terry and Operation Rescue, to give a person of ordinary intelligence fair notice of what conduct is being proscribed. *See* 886 F.2d at 1352; *In re Baldwin-United Corp.*, 770 F.2d 328, 339 (2d Cir. 1985). Thus, the orders fully satisfied the specificity requirements of Rule 65(d). *See* 886 F.2d at 1351-52.

The Court will now examine respondents' conduct as it relates to the October 27 Order and the Permanent Injunction.

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[13] Additionally, respondents challenged the reasonableness of the $25,000 sanction. Both this Court and the Court of Appeals considered the amount of the coercive fines listed in the Court's orders and concluded that they were reasonable in relation the facts and circumstances of this case. *See* 886 F.2d at 1353; 704 F.Supp. at 1263-64; 697 F.Supp. 1332-34. Indeed, the persistent conduct of certain contemnors in continually violating the orders implies that the coercive sanctions may not be stringent enough to protect plaintiffs' rights. Neither defendants nor respondents provided the Court with any financial information upon which the burden of imposing the sanction on them might be evaluated, and this failure may not be charged against plaintiffs in determining the reasonableness of the fine. *See* 886 F.2d at 1353.

2. B.O.R.N.

Plaintiffs assert that B.O.R.N. is liable for $25,000 due to its involvement with the sponsorship of the demonstrations in Deer Park and Dobbs Ferry, New York on October 29, 1988, in violation of the October 27 Order. B.O.R.N. is a local group affiliated with Operation Rescue. Six of its leaders, including respondents Lee and LaPenna, signed a letter on B.O.R.N. letterhead calling on its members to participate in the "National Day of Rescue" called by Operation Rescue in October 1988. Exhibit G, annexed to Gundrum Aff.; Exhibit 37, annexed to Gundrum Decl. A rally, announced by a B.O.R.N. newsletter, was held on October 27, 1988, at which time Lee criticized the Court's preliminary injunction. Ex 19, annexed to Gundrum Decl. Lee led the demonstration in Dobbs Ferry, and LaPenna was arrested at the demonstration in Deer Park. Exhibits 19 & 14, annexed to Gundrum Decl. Plaintiffs have demonstrated with clear and convincing proof that B.O.R.N. had knowledge of the October 27 Order and acted in concert with defendants to violate that order. Accordingly, B.O.R.N. is adjudged in civil contempt of the October 27 Order and is assessed coercive civil penalties in the amount of $25,000.

3. Lee

Plaintiffs assert that Lee is liable for $100,000 do to his active involvement with defendants in violating the Court's October 27 Order and the Permanent Injunction. This amount is computed as follows: (1) $25,000 for the demonstration in violation of the October 27 Order at Dobbs Ferry, New York on October 29, 1988, (2) $25,000 for the demonstration in violation of the Permanent Injunction at the Margaret Sanger Clinic on January 13, 1989, and (3) $50,000 for the demonstration in violation of the Permanent Injunction at the VIP Medical

Associates Clinic in Manhattan (the "VIP Clinic") on January 14, 1989.

Lee, a leader of B.O.R.N., discussed the October 27 Order at a rally on October 1988, prior to leading the demonstration in Dobbs Ferry on October 29 which blocked access to the Women's Pavilion medical clinic as part of Operation Rescue's "National Day of Rescue". Exhibits 19, 18 & 37, annexed to Gundrum Decl.

Lee was personally served with a copy of the Permanent Injunction on or about January 12, 1989, at a meeting between police and Operation Rescue leaders. Exhibit 27, annexed to Gundrum Decl. Lee participated in the demonstration on January 13, 1989 which blocked access to the Margaret Sanger Clinic, during which time he described himself as an Operation Rescue leader, authorized to speak for the group, and stated that their purpose was "to block the doors so they cannot do abortions today." Exhibit 17, annexed to Gundrum Decl.

On January 14, 1989, Lee participated in the demonstration which blocked access to the VIP Clinic. Lee wore an armband with the inscription "O.R." and directed demonstrators in blocking the clinic door. Exhibit 18, annexed to Gundrum Decl. Lee used a bullhorn to lead songs when a police officer began to read the Permanent Injunction to the demonstrators. *Id.* After refusing to move, Lee was arrested. These undisputed facts definitively supply the requisite clear and convincing proof that Lee acted in concert with defendants in violating the Court's orders and blocking access to clinics, with knowledge of the October 27 Order and the Permanent Injunction. Consequently, Lee is adjudged in **[406]** civil contempt of the October 27 Order and the Permanent Injunction and is assessed coercive civil penalties in the amount of $100,000.

4. Foreman, McMonagle and White

Plaintiffs assert that Foreman, McMonagle and White are each liable for $25,000 due to their active involvement with defendants in violating the Permanent Injunction by participating in the demonstration at the Margaret Sanger Clinic on January 13, 1989. Both Foreman and McMonagle received notice of the Permanent Injunction by being served a copy of the order at a meeting on or about January 12, 1989, between the police and Operation Rescue leaders. Exhibit 27, annexed to Gundrum Decl. Foreman, McMonagle and White all participated in the January 13, 1989 demonstration that blocked access to the Margaret Sanger Clinic. McMonagle wore an armband with the inscription "O.R." and gave demonstrators instructions before and while they were being arrested. Exhibit 17, annexed to Gundrum Decl. White was present when the Permanent Injunction was read by the police, instructed demonstrators in blocking access to the clinic, and was arrested for his participation in the demonstration. Statement of Material Facts Not in Dispute, filed June 9, 1989.

The evidence clearly demonstrates that Foreman, McMonagle and White had notice of the Permanent Injunction yet, nonetheless, acted in concert with defendants to intentionally violate the Court's decree. Therefore, Foreman, McMonagle and White are each adjudged in civil contempt of the Permanent Injunction and are each assessed coercive civil penalties in the amount of $25,000.

5. Talluto and LaPenna

Plaintiffs assert that Talluto is liable for $50,000 for her active involvement with defendants in violating the October 27 Order and the Permanent Injunction: $25,000 for her participation in the demonstration at the Women's Pavilion clinic

in Deer Park, New York on October 29, 1988 and $25,000 for her participation in the demonstration at the VIP Clinic in Manhattan on January 14, 1989.

Plaintiffs assert that LaPenna is liable for $25,000 for his active involvement with defendants in violating the October 27 Order by blocking access to the Women's Pavilion clinic in Deer Park, New York on October 29, 1988. LaPenna was one of the six leaders of B.O.R.N. who signed the letter calling on individuals to participate in the "National Day of Rescue" called by Operation Rescue for October 1988.

The October 27 Order was read to persons blocking access to the clinic from across the street by a number of counter demonstrators, before police began arresting the demonstrators. Exhibit 37, Annexed to Gundrum Decl. Both Talluto and LaPenna were arrested for blocking access to he clinic. Exhibits 15 and 39, annexed to Gundrum Decl.

On January 14, 1989, Talluto participated in a demonstration sponsored by Operation Rescue which blocked access to the V.I.P. clinic in Manhattan. Inspector James Helbock read the Permanent Injunction to the demonstrators, before police began making arrests. Talluto was arrested that day for blocking access to the clinic.

The uncontroverted evidence is sufficient to establish that Talluto and LaPenna had notice of the October 27 Order and that Talluto had notice of the Permanent Injunction, yet both acted in concert with defendants to intentionally violate these orders. Accordingly, Talluto is adjudged in civil contempt and assessed coercive civil penalties in the amount of $50,000 and LaPenna is adjudged in civil contempt and assessed coercive civil penalties in the amount of $25,000.

6. B. Nathanson

Plaintiffs assert that B. Nathanson is liable for $25,000 for his active involvement with defendants in violating the Permanent Injunction by blocking access to the Margaret Sanger Clinic on January 13, 1989. B. Nathanson testified that he attended the Operation Rescue demonstration held at the Margaret Sanger Clinic on [407] January 13, 1989. Tr. 207-08. He was also present at an Operation Rescue rally the night before, where he was informed that Operation Rescue demonstrators would meet at an assembly point in midtown Manhattan, on the morning of January 13, 1989, and then proceed to an unspecified facility where abortions are performed. Tr. 204-06. B. Nathanson arrived at the designated assembly point and followed an Operation Rescue marshal to the site of what he knew to be an Operation Rescue demonstration in front of the clinic. Tr. 204-06, 208-09. He arrived at the demonstration between 7:00 and 7:30 a.m., Tr. 207, 584, and spent approximately three to four hours standing or sitting on the sidewalk near the front of the clinic. Tr. 201-03, 07.

Ellen Carton, an employee of the New York State affiliate of the National Abortion Rights Action League, testified that she served B. Nathanson with a copy of the permanent injunction as he sat in front of the clinic that morning. Tr. 511-12. There was conflicting testimony presented regarding where B. Nathanson stood or sat for most of his time at the demonstration, with some evidence that he remained in the area in front of the clinic until approximately 8:00 a.m. Tr. 202-03, 245-47, 452, 467, 586-89. B. Nathanson, however, maintained that he remained on the periphery of the demonstration for most of his time there, outside of the main group of demonstrators blocking access to the clinic. Tr. 220-223, 589. The Permanent Injunction was read over a bullhorn by police at approximately

8:00 a.m., prior to their commencing arrests of demonstrators blocking access to the clinic. B. Nathanson was not arrested.

While the Court believes that the evidence presented regarding B. Nathanson's activities on January 13 indicates that he received notice of the injunction and was well aware of the purpose of the demonstration and Operation Rescue's sponsorship of the demonstration, it does not clearly and convincingly show that he acting concert with defendants to violate the Permanent Injunction. The Court notes: (1) a lack of clear evidence placing B. Nathanson in the area in front of the clinic for any length of time after he was apparently served with the injunction or after the police read the injunction, (2) his stated denial that he remained in this area, and (3) the failure of his conduct to result in his arrest, when hundreds of other demonstrators blocking access to the clinic were arrested. These factors militate against finding that plaintiffs have carried their burden of proving, by clear and convincing evidence, that he violated the Court's order. Accordingly, B. Nathanson is not adjudged in civil contempt for his actions on January 13, 1989.

7. A. Nathanson

Plaintiffs assert that A. Nathanson is liable for $25,000 due to her active involvement with defendants in violating the October 27 Order by blocking access to the Women's Pavilion clinic in Dobbs Ferry on October 29, 1988. A. Nathanson testified that she sat on the steps in front of the clinic with the intention of blocking entrance and exit from the premises. Tr. 561, 267-68. In addition, she admitted that she was aware that on October 29, 1988, Operation Rescue had called for demonstrations across the country. Tr. 564-65. She testified that she was a "National Day of Rescue participant" and followed instructions from Operation Rescue marshals wearing Operation Rescue armbands. Tr. 263, 278, 430-31. Plaintiffs

introduced a videotape of the demonstration which clearly shows that the entrance to the clinic was blocked by the demonstrators, and that A. Nathanson formed part of that blockade at various times during the demonstration. Hearing Exhibit 9 ("Ex 9").

A. Nathanson disputes receiving notice of the October 27 Order, but the evidence adduced at the hearing demonstrated that this assertion was not credible. Notice was given to the demonstrators in several ways that day. Kelli Conlin, the former president of the New York City chapter of N.O.W., testified that she read the October 27 Order through a bullhorn to the demonstrators at approximately 8:00 a.m. Tr. 432. At approximately 9:30 a.m., Lieutenant Perilli of the Dobbs Ferry police department, [408] while standing directly in front of the demonstrators, read the October 27 Order to them through a bullhorn. Ex. 9; Tr. 433-437. The demonstrators were quiet during both times that the injunction was read, Tr. 432-33; Ex. 9, and there was testimony that the words of the injunction were clearly audible from some distance away. Tr. 436-37, 443. The videotape of the demonstration clearly showed A. Nathanson blocking access to the clinic at approximately 9:10 a.m., after the first reading of the October 27 Order, at approximately 9:30 a.m., as Lt. Perilli finished reading the October 27 Order and at approximately 10:40 a.m., while counter-demonstrators could be heard chanting "enforce the injunction." Ex. 9.

A. Nathanson argues that she should not be found to have violated the October 27 Order because none of the demonstrators were arrested that day, and eventually they all left of their own volition. The lack of arrests, however, does not alter the fact that access to the clinic was blocked by Operation Rescue and National Day of Rescue participants, without permission, in violation of the October 27 Order. The evidence clearly and convincingly established that A. Nathanson acted in concert with defendants to block access to the clinic, received

actual notice of the October 27 Order, yet did not cease her participation in the demonstration or refrain from blocking access to the clinic. Therefore, A. Nathanson is adjudged in civil contempt of the October 27 Order and assessed coercive civil penalties in the amount of $25,000.

8. Pearson

Plaintiffs assert that Pearson is liable for $25,000 due to his active involvement with defendants in violating the Permanent Injunction by blocking access to the VIP Clinic in Manhattan on January 14, 1989.[14] Pearson testified that he travelled from New Jersey on January 14, 1989, in order to participate in an Operation Rescue demonstration. Tr. 166, 535, 541. He arrived at the VIP Clinic before 8:00 a.m. on January 14, 1989. Tr. 164-65. A police videotape of the demonstration was introduced at the hearing, which shows that the Permanent Injunction was read to the crowd of demonstrators blocking access to the clinic by a police officer. Hearing Exhibit 1 ("Ex. 1") Pearson is clearly visible in the videotape, standing inside a police barricade, only a few feet away from the police officer

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[14] Pearson, in an untimely post-hearing submission, argues for the first time that plaintiffs failed to prove the VIP Clinic is a facility that offers abortions. This after-the fact assertion is groundless. The hearing was commenced to determine the disputed factual issues raised by respondents -- whether they had actual notice of the Court's orders and acted in concert with defendants in violation of these orders. Plaintiffs asserted that the VIP Clinic is a facility that performs abortions in the Statement of Material Facts not in Dispute, filed June 9, 1989. Pearson decided not to challenge this assertion. Indeed, his testimony at the hearing readily implies that he believes abortions are offered at the VIP Clinic, thus prompting the "rescue" demonstration . Tr. 535, 541, 548. He cannot now argue that his failure to contest whether the VIP Clinic offered abortions supplies a means to avoid the consequences of his own actions.

who was standing on the other side of the barricade, as the officer read the Permanent Injunction with the aid of a bullhorn. *Id.* After the officer announced he was about to read the injunction, the demonstrators began singing. *Id.* Pearson testified that singing during the reading of court orders is standard procedure for demonstrators participating in "rescues" in which they block access to clinics performing abortions, and that he believed that was exactly what was happening on January 14, 1989. Tr. 538.

Copies of the Permanent Injunction were distributed to demonstrators sitting or standing in front of the doors of the VIP clinic. Tr. 503. Another videotape was introduced by plaintiffs which shows a uniformed police officer handing a set of papers, identified as a copy of the permanent injunction, to Pearson as he stood inside the police barricades, blocking access to the clinic. Hearing Exhibit 5 ("Ex. 5"); Tr. 503, 408.

After the injunction was read, and after being served with a copy of the injunction, **[409]** Pearson nevertheless remained standing in front of the clinic with other Operation Rescue demonstrators, blocking access to the door, and at one point linking arms with other demonstrators to form a more effective human barricade. Ex. 5; *See* Tr. 390. The police arrested Pearson for his activities in blocking access to the clinic that day. Tr. 168.

The evidence presented to the Court was overwhelming that Pearson had notice of the Permanent Injunction, yet nonetheless acted in concert with defendants in violating the order by blocking ingress to and egress from the VIP Clinic on January 14, 1989. Pearson's protestations that he had no notice of the injunction are clearly belied by the videotapes and the other evidence submitted at the hearing, and are simply not

credible.[15] Accordingly, Pearson is adjudged in civil contempt of the Permanent Injunction and assessed a coercive fine in the amount of $25,000.

C. *Attorneys' Fees and Costs*

Plaintiffs seek attorneys' fees and costs from each contemnor to compensate them for their expenditures in bringing on the motion for contempt. Civil contempt sanctions may serve either to coerce the contemnor into future compliance with a court's order or to compensate the complainant for losses resulting from the contemnor's past noncompliance. 886 F.2d at 1352. The $25,000 fines were coercive sanctions designed to ensure compliance with the Court's orders. In addition, the Permanent Injunction expressly warned "that each contemnor shall be jointly and severally liable for all attorneys' fees and related costs incurred by plaintiffs in enforcing this Order. "This additional penalty can likewise be viewed as a coercive fine designed to ensure compliance.

Moreover, where respondents have "responded with callous indifference to [their] obligations unde the order," not only are coercive sanctions justified, but also costs and attorneys' fees. *N.A. Sales Co., Inc. v. Chapman Industries Corp.*, 736 F.2d 854, 858 (2d Cir.1984); *See also Hutto v. Finney*, 437 U.S. 678, 689 n. 14, 98 S.Ct. 2565, 2573 n. 14, 57 L.Ed.2d 522 (1978); Rule 43(a), Civil Rules of the United States Courts for the Southern and Eastern Districts of New York ("Civil Rules") ("A reasonable counsel fee, necessitated by the contempt proceedings, may be included as an item of damage.")

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[15] In any event, conscious disregard of notice of the Permanent Injunction will not suffice to provide immunity for actions then taken in direct violation of that order.

An award of attorneys' fees and costs serves the compensatory purpose of civil contempt and avoids penalizing the complainant who is protected by the order, for the actions of contemnors who purposefully violate that order. *See Local 28 of the Sheet Metal Workers' Int'l Assoc. v. E.E.O.C.*, 478 U.S. 421, 444 n.23, 106 S.Ct. 3019, 3033 n. 23, 92 L.Ed.2d 344 (1986); *Vuitton et Fils, S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir.1979) (if the violation of the court's order is willful, compensatory damages to the complainant should include reasonable costs for prosecuting the contempt, including attorneys' fees). The evidence more than adequately demonstrates the intentional violation of the three orders of this Court by the various defendant and respondent contemnors. Accordingly, each defendant and respondent who violated the May 4 Order, the October 27 Order and/or the Permanent Injunction is liable for the attorneys' fees and costs incurred by plaintiffs as a result of bringing the contempt motion against him or her.

D. *The Rule 11 Motion Against Washburn*

On July 14, 1989, certain respondents, through attorney Washburn, filed a memorandum opposing the Order to Show Cause. The memorandum raised three arguments: (1) lack of subject matter jurisdiction over the underlying claims raised by plaintiffs in this action, (2) lack of subject matter jurisdiction because of the pending appeals and (3) improper service of the Order to Show Cause under Rules 4(c)(2)(C)(i) and (ii). On July 28, 1989, Washburn argued each of these points and **[410]** orally moved to dismiss the action against Talluto and LaPenna. The Court advised Washburn to submit a motion in proper form, with supporting affidavits, if he wished to move to dismiss or quash service on behalf of respondents. On August 4, 1989, Washburn filed a cross-motion to dismiss plaintiffs' motion for

contempt on behalf of respondents Talluto, LaPenna, White and McMonagle. The cross-motion asserted dismissal was appropriate because (1) service of the Order to Show Cause was improper under various provisions of Rule 4, (2) respondents enjoyed a good faith immunity as national citizens under the Privileges and Immunities clause of the 14th Amendment and (3) respondents were not offered an opportunity to purge their contempt, thus making the proceeding one for criminal contempt.[16]

Also on that date, Lee and Foreman filed a similar cross-motion to dismiss the motion for contempt, incorporating, in substantial part, the arguments made in the motion by Talluto, LaPenna, White and McMonagle. The cross-motion by Lee and Foreman was denied in part in accordance with an oral decision rendered on August 9, 1989. At that time, the Court reserved decision on the portion of the cross-motion by Lee and Foreman which was based upon the related cross-motion to be argued by Washburn. The latter cross-motion was denied in all respects, form the reasons stated by the Court during oral argument on August 10, 1989. Tr. 319-21. This denial was without

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16 The substance of the arguments raised by Washburn, that service of the Order to Show Cause was improper and that the proceeding was one for criminal contempt, have been addressed and rejected by the Court in the preceding discussion. *See infra*, Sections A and B. The additional argument, that the Privileges and Immunities clause provides a shield for respondents who act in knowing violation of the Court's orders, was advanced by Washburn without relevant legal authority and is completely without foundation. In fact, the authorities that Washburn cites in his subsequent memorandum, ostensibly for support, directly contradict his argument. *See* Respondents' Memorandum dated August 30, 1989, filed September 15, 1989 at 7. Respondents have no Constitutional right to intentionally violate the orders of the Court.

prejudice. The Court explained that the motion, as it was addressed to the issue of service, was inadequate in its present form, as there were no affidavits by any of the respondents concerning service. Tr. 300-02, 318-21. The Court cautioned Washburn and the respondents that "[i]n the event the motion is renewed and denied as frivolous, the Court would entertain a motion by plaintiffs for appropriate sanctions." Memorandum Endorsement, filed August 10, 1989. On August 16, 1989, the Court extended the period for renewal of the motion until August 30, 1989, in order to allow Washburn time to make a thorough investigation of his claims, once again noting the possibility of Rule 11 sanctions should such a renewed motion be frivolous. Tr. 604-06.

On August 30, 1989, Washburn, on behalf of Talluto, LaPenna, White and McMonagle, filed a document requesting to renew the August 4 cross-motion. Subsequently, plaintiffs filed a motion for the imposition of Rule 11 sanctions against Washburn.

The document Washburn filed on August 30, 1989, titled "Respondents' Memorandum dated August 30, 1989" is signed by Washburn and purports to renew the earlier motion. No notice of motion was filed, nor were any supporting affidavits attached, despite the directive of the Court and the requirements of Civil Rule 3. No new arguments were advanced in the memorandum, with the exception of a section arguing that attorneys possess immunity from sanctions for their conduct in

a judicial proceeding and, therefore, that Rule 11 sanctions cannot be imposed upon them.[17]

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[17] This new argument advances yet another baseless claim. Washburn urges that Rule 11, as amended in 1983, violates the Rules Enabling Act, 28 U.S.C. § 2072, which provides that the Federal Rules of Civil Procedure "shall not abridge, enlarge, or modify any substantive right." He asserts that Rule 11 abridges an attorney's common law substantive right to absolute immunity from sanctions that arise from actions taken in judicial proceedings.

Nowhere, however, has Washburn cited any authority for his proposition that attorneys enjoy common law immunity from sanctions for frivolous conduct before a court. Indeed, courts have had the equitable power to award costs and attorneys fees as sanctions for frivolous conduct prior to the enactment of Rule 11. *See Hall v. Cole*, 412 U.S. 1, 5, 93 S.Ct. 1943, 1946, 36 L.Ed.2d 702 (1973), *superseded by statute on other grounds*, Act of Jan. 2, 1975, Pub.L.No. 93-600, § 3,88 Stat.1955. *See also* Notes of the Advisory Committee on Rule 11. As the Supreme Court has explained:

> [t]he power of a court over members of its bar is at least as great as its authority over litigants. If a court may tax counsel fees against a party who has litigated in bad faith, it certainly may assess those expenses against counsel who willfully abuse judicial processes.

Roadway Express, Inc. v. Piper, 447 U.S. 752, 766, 100 S.Ct. 2455, 2464, 65 L.Ed.2d 488 (1980), *superseded by statute on other grounds*, Act of September 12, 1980, Pub.L. 96-349, § 3, 94 Stat 1156, 1156 (codified as amended at 28 U.S.C. § 1927).

Moreover, the Supreme Court has upheld Rule 38, Federal Rule of Appellate Procedure, which awards costs and damages to the appellee when a court of appeals determines that an appeal is frivolous, against a challenge that it conflicted with a state statute and thus abridged a substantive right in violation of the Rules Enabling Act, *Burlington Northern Railroad Co. v. Woods*, 480 U.S. 1, 8, 107 S.Ct. 967, 971, 94 L.Ed.2d 1 (1986). The Supreme Court stated that:

(continued...)

[411] 1. Standards for Imposing Rule 11 Sanctions

Rule 11 provides, in pertinent part, that: The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and warranted by existing law or a good faith argument for the

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[17](...continued)

> [t]he cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidently affect litigants' substantive rights do not violate [28 U.S.C. § 2072] if reasonably necessary to maintain the integrity of that system of rules.

Id. at 5, 107 S.Ct. at 970.

Rule 11, like Rule 38, may provide for the award of just damages to a party burdened by frivolous conduct, and is similarly essential to the underlying purpose of the Federal Rules of Civil Procedure, which are to be "construed to secure the just, speedy and inexpensive determination of every action." Rule 1, Fed.R.Civ.P.

Furthermore, the Fifth Circuit, in upholding the validity of Rule 11 under the Rules Enabling Act, concluding that Rule 11 serves to regulate procedure by discouraging groundless judicial proceedings, and does not confer any new substantive rights. *Port Drum Co. v. Umphrey*, 852 F.2d 148, 150 (5th Cir. 1988); *See also Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 483 (3rd Cir.1987) (Rule 11 does not occasion a substantive change in the general rule against fee shifting, but instead provides for a correction of litigation abuses which does not offend the Rules Enabling Act); *Schmitz v. Campbell-Mithun, Inc.*, 124 F.R.D. 189, 193 (N.D.Ill.1989) (Rule 11 is procedural, designed to protect the integrity of papers submitted to the Court, and does not run afoul of the Rules Enabling Act).

Accordingly, there is no basis for Washburn's assertion that Rule 11 violates the Rules Enabling Act by abrogating an illusory common law immunity to engage in vexatious conduct.

extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost in the litigation.... If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

While the imposition of sanctions is mandatory when a claim has absolutely no chance of success, the Court is to avoid hindsight review of the claim, to resolve all doubts in favor of the signer and to refrain from imposing sanctions where such action would stifle the enthusiasm or chill the creativity that is the very lifeblood of the law. *Motown Productions, Inc. v. Cacomm, Inc.*, 849 F.2d 781,785 (2d Cir. 1988); *Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir. 1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987); *Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985).

There need be no showing of bad faith on the part of the signer of the submission at issue for the imposition of sanctions. *Cross & Cross Properties, Ltd. v. Everett Allied Co.*, 886 F.2d 497, 504 (2d Cir.1989). **[412]** Instead, sanctions are appropriate where an attorney's signed submission fails to meet a test of objective reasonableness. *McMahon v. Shearson/American Express, Inc.*, 896 F.2d 17, 22 (2d Cir.1990); *Cross & Cross Properties, Ltd. v. Everett Allied Co., supra*, 886 F.2d at 504.

> Although other goals for the imposition of sanctions under Rule 11 may exist, for example, punishment for violation of the Rule, compensation for victim of the violation, and deterrence of others, focus should be on the drafters' aim of discouraging dilatory and abusive litigation tactics and eliminating frivolous claims and defenses, thereby speeding up and reducing the costs of the litigation process. Sanctions are the deterrent threat, [citation omitted] by which a district court judge may deal with counsel who ignore their broadened responsibility under the amended Rule to forward the effective administration of justice.

McMahon v. Shearson/American Express, Inc., supra, 896 F.2d at 21.

2. Washburn's Conduct and Rule 11 Sanctions

Washburn was twice warned by the Court that resubmitting the motion without factual affidavits or other additional support would expose him to the risk of Rule 11 sanctions. The arguments advanced by Washburn were each previously rejected by the Court and, with the exception of the challenge to the manner of service on Talluto and LaPenna, were each manifestly frivolous. When an attorney submits, or resubmits, a motion that he knew, or should have known, was meritless, Rule 11 sanctions are appropriate. *See Vekris v. Peoples Express Airlines, Inc.,* 707 F.Supp. 679, 682 (S.D.N.Y.1988) (submission of motion for reargument which merely rehashed arguments previously made and decided was precisely the sort of frivolous motion targeted by Rule 11); *Fuji Photo Film U.S.A. v. Aero Mayflower Transit Co., Inc.,* 112 F.R.D. 664, 667-68 (S.D.N.Y.1986); *Northern Trust Co. v. Muller,* 616 F.Supp. 788, 790 (N.D.Ill.1985). While the Court

does not impose sanctions lightly, an objective analysis of Washburn's conduct in resubmitting the motion without affidavits or additional support, and in substantially the same manner as it had been when previously denied by the Court, leads only to the conclusion that Washburn violated Rule 11. Such vexatious conduct, which unduly delayed the adjudication of the contempt proceedings, cannot be countenanced by the Court, nor should plaintiffs be forced to bear the excess burden Washburn's actions placed upon them.

Accordingly, the Court imposes Rule 11 sanctions against Washburn, in the amount of the costs and attorneys' fees reasonably incurred by plaintiffs in filing their motion for sanctions and their response to the renewed motion to dismiss.

E. *The Motion to Strike a Portion of the Record and Impose Sanctions on Hale under 28 U.S.C. § 1987*

Plaintiffs moved to strike a portion of the record and for costs and attorneys' fees pursuant to 28 U.S.C. § 1927 against Hale, attorney for the Nathansons. At the close of the evidentiary hearing held regarding the conduct of Pearson and the Nathansons, Hale asserted that Ex. 9, a police videotape of the Dobbs Ferry demonstration on October 29, 1988, had been tampered with to include a "snippet" showing A. Nathanson sitting on the steps of the clinic seconds after Lt. Perilli read the October 27 Order to the demonstrators.

The foundation for Hale's serious assertion of impropriety concerning this piece of evidence was his observation, upon viewing the videotape in Court, that the particular segment in dispute showed the date but not the time, while the footage immediately preceding it showed the time. Hale had the opportunity to view the tape on August 9, 1988, prior to the hearing. He maintains, however, that he did not

remember seeing the disputed segment at that time. Affidavit of John P. Hale, filed September 29, 1989. The Court allowed Hale to secure an expert to inspect the videotape, but Hale never availed himself of this opportunity. Instead, Hale interviewed Lt. Perilli and the operator of the police video machine, [413] and discovered that there was no basis to his claim. Hale notified the Court that he was withdrawing his objections to the videotape by letter, dated September 5, 1989. Prior to advising the Court that he withdrew his objections, however, Hale spoke with counsel for plaintiffs three times, each time broaching the topic of settlement, as well as the issue of the videotape. Affidavit of Mary M. Gundrum, filed September 8, 1989 ¶¶ 5-7.

Plaintiffs ask that the portion of the record which contains Hale's admittedly erroneous assertion that the videotape was altered be stricken, in order to clarify the record and to remove the groundless suggestion of improper behavior on the part of plaintiffs and their counsel. Hale offers no objection to this portion of the motion. The Court believes these fallacious accusations have no place in the record, and agrees with plaintiffs' suggestion that they be stricken. Accordingly, pages 573 to 583 and pages 601, line 14 to 602, line 8, are hereby stricken from the record.

Plaintiffs next argue that sanctions should be imposed against Hale under 28 U.S.C. § 1927. Section 1927 provides that:

> [a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and

> attorneys' fees reasonably incurred because of such conduct.

This provision is to be construed narrowly and with caution by the courts. *Mone v. Commissioner of Internal Revenue*, 774 F.2d 570, 574 (2d Cir. 1985). To justify the imposition of sanctions under section 1927, the attorney's "conduct must be of an egregious nature, stamped by bad faith that is violative of recognized standards in the conduct of litigation." *Colucci v. New York Times, Co.*, 533 F.Supp. 1011, 1014 (S.D.N.Y. 1982). *See also McMahon v. Shearson/American Express, Inc., supra*, 896 F.2d at 23.

Hale's conduct in (1) making such a serious accusation prior to undertaking an inquiry into its basis when the opportunity to inspect the tape had been previously made available to him, and (2) referring to this allegation in settlement conversations with plaintiffs, is more than a little troubling to the Court. See D.R. 7-105(A), Code of Professional Responsibility, Appendix to New York State Judiciary Law (a lawyer shall not threaten criminal charges solely in an attempt to obtain an advantage in a civil matter). In the Court's view, however,this conduct did not rise to the level of bad faith necessary to warrant the imposition of sanctions, as a discrepancy appeared to exist which could not be readily explained at the hearing, and Hale withdrew his charge upon discovering that it had no merit. *Cf. Woodfork v. Gavin*, 105 F.R.D. 100, 105 (N.D.Miss. 1985) (sanctions imposed under section 1927 because attorney maintained allegations of fraud and criminal conduct after subsequent discovery proved these allegations to be unfounded). Therefore, no sanctions will be imposed against Hale.

CONCLUSION

Plaintiffs' motion for civil contempt is granted in part and denied in part. Defendants Randall Terry and Operation Rescue are adjudged in civil contempt of this Court's October 27 Order and Permanent Injunction and are assessed coercive civil penalties in the amount of $100,000. Defendant Herlihy is adjudged in civil contempt of this Court's May 4 Order and assessed coercive civil penalties in the amount of $25,000. Respondent B.O.R.N. is adjudged in civil contempt of this Court's October 27 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Lee is adjudged in civil contempt of the Court's May 4 Order, October 27 Order and Permanent Injunction and assessed coercive civil penalties in the amount of $100,000. Respondent Foreman is adjudged in civil contempt of the Court's May 4, Order and Permanent Injunction and assessed coercive civil penalties in the amount of $25,000. Respondents McMonagle and White are adjudged in civil contempt [414] of the Court's Permanent Injunction and assessed coercive civil penalties in the amount of $25,000. Respondent LaPenna is adjudged in civil contempt of the Court's May 4 Order and October 27 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Talluto is adjudged in civil contempt of the Court's October 27 Order and Permanent Injunction and assessed coercive civil penalties in the amount of $50,000. Respondent Adelle Nathanson is adjudged in civil contempt of the Court's October 27 order and assessed coercive civil penalties in the amount of $25,000. Respondent Pearson is adjudged in civil contempt of the Court's Permanent Injunction and assessed coercive civil penalties in the amount of $25,000. Respondent Bernard Nathanson is not adjudged in civil contempt.

Each of the contemnors is liable to plaintiffs for a pro rata share of the attorneys' fees and costs incurred by plaintiffs as a result of bringing the contempt motion against him or her,

with the exception of the renewed cross-motion to dismiss filed by attorney Washburn.

The renewed cross-motion to dismiss on behalf of respondents Talluto, LaPenna, White and McMonagle, is denied. Plaintiffs' motion for the imposition of Rule 11 sanctions against attorney Washburn is granted. Washburn is liable to plaintiffs for the attorneys' fees and costs they incurred as a result of filing their motion for sanctions and responding to his renewed cross-motion to dismiss.

Plaintiffs are directed to serve and file, within twenty (20) days of the date of this decision, an application detailing their expenses, including their attorneys' fees, regarding the contempt proceedings and the renewed cross-motion.

The motion by plaintiffs to strike a portion of the record and impose sanctions under 28 U.S.C. § 1927 against attorney Hale is granted in part and denied in part. The record is stricken in accordance with plaintiffs' request, but the Court declines to impose sanctions on Hale.

In addition, plaintiffs are directed to confer with counsel representing respondent Slattery, and apprise the Court by letter no later than March 6, 1990, of several mutually convenient dates for a conference on the pending application to hold him in civil contempt. Defendants' requests to submit sur-reply briefs to the pending motions by plaintiffs for attorneys' fees and costs under 42 U.S.C. § 1988 and by the United States to confirm an order of attachment are granted. Defendants shall serve and file the sur-reply briefs by March 2, 1990, and each moving party may serve and file any final response by March 9, 1990.

Settle orders on notice.

APPENDIX J

Permanent Injunction dated January 10, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 3071 (RJW)

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN, et al.,

Plaintiffs,

THE CITY OF NEW YORK,

Intervenor-Plaintiff,

-against-

RANDALL TERRY, et al.,

Defendants.

ORDER

UPON the undisputed facts in this case, supported by the affidavits, exhibits, and three statements of stipulated facts, the summons and complaint, and all papers and proceedings herein,

and counsel for all parties have appeared and argued before the Court on January 6, 1989, it is hereby

ORDERED that the defendants, the officers, directors, agents and representatives of defendants, and all other local organizations and persons whomsoever acting in concert with them, and with notice of this order (hereinafter "Operation Rescue participants") are:

1) permanently enjoined and restrained in any manner or by any means from:

a) trespassing on, blocking, or obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk or Westchester counties;

b) physically abusing or tortiously harassing persons entering, leaving, working at, or using any services at any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester Countries; Provided, however, that sidewalk counseling, consisting of reasonably quiet conversation of a nonthreatening nature by not more than two people with each person they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling and that if anyone who wants to, who is sought to be counseled wants to not have counseling, wants to leave, walk away, they shall have the absolute right to do that.

In addition, provided that this right to sidewalk counseling as defined here shall not limit the right of the Police Department to maintain public order by reasonably necessary rules and regulations as they decide are necessary at each particular demonstration site; and it is further

ORDERED that nothing in this Order shall be construed to limit Operation Rescue Participants' exercise of their legitimate First Amendment rights, and it is further

ORDERED that the failure to comply with this Order by any Operation Rescue participant with actual notice of the provisions of this Order shall subject him or her to civil damages of $25,000 per day for the first violation of this Order; and it is further

ORDERED that each successive violation of this Order shall subject the contemnor to a civil contempt fine double that of the previous fine; and it is further

ORDERED that any amounts collected thereunder shall be paid into the Registry of the Court to be disbursed by further Order of the Court; and it is further

ORDERED that each contemnor shall be jointly and severally liable for all attorneys' fees and related costs incurred by plaintiffs in relation to enforcement of this Order; and

Upon application of the City of New York, it is further

ORDERED that in addition to the per diem amount ordered above, Operation Rescue participants shall be jointly and severally liable to pay any excess costs incurred by the City of New York as a result of Operation Rescue participants' failure to provide the City with advance notice of the location of their demonstrations, unless Operation Rescue participants give the

New York City Police Department twelve hours advance notice of the location of each day's demonstrations.

/s/ ROBERT J. WARD
Robert J. Ward

United States District Judge

Dated: New York, New York
January 10, 1989

APPENDIX K

Preliminary Injunction Order
Dated October 27, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 3071 (RJW)

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN, THE CITY OF NEW YORK, et al.,

Plaintiffs,

-against-

RANDALL TERRY, OPERATION RESCUE, THOMAS HERLIHY et al.,

Defendants.

ORDER

UPON the testimony of witnesses for plaintiffs and defendants heard before this Court on October 25 and 27, 1988, the affidavits submitted herein by plaintiffs, plaintiff-intervenor, and defendants, the exhibits attached thereto, the three statements

of stipulated facts, the summons and complaint, and all the papers and proceedings herein, and counsel for all parties having appeared and argued before the Court on October 25 and 27, 1988, it is hereby

ORDERED that the order issued by Justice Herman Cahn on April 28, 1988, modified by Justice Cahn on May 2, 1988, and modified by order of this Court on May 4, 1988, is hereby again modified by order of this Court, and as restated herein in full as follows:

It is hereby

ORDERED that the defendants, the officers, directors, agents and representatives of defendants, and all other persons whomsoever acting in concert with them, and with notice of this order (hereinafter "Operation Rescue or National Day of Rescue participants") are

1) enjoined and restrained in any manner or by any means from:

a) trespassing on, blocking, or obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester counties, on October 28, 29 and 31, 1988;

b) physically abusing or tortiously harassing persons entering, leaving, working at, or using any services at any facility at which abortions are performed in the City of New York; Nassau, Suffolk, or Westchester Counties, on October 28, 29, and 31, 1988. Provided, however, that sidewalk counseling, consisting of reasonably quiet conversation of nonthreatening nature by not more than two people with each person they are seeking to counsel shall not be prohibited. Also provided that no

one is required to accept or listen to sidewalk counseling and if anyone who wants to, who is sought to be counseled wants to not having counseling, wants to leave, walk away, they shall have the absolute right to do that.

In addition, provided that this right to sidewalk counseling as defined here shall not limit the right of the Police Department to maintain public order by reasonably necessary rules and regulations as they decide are necessary at each particular demonstration site; and it is further

ORDERED that nothing in this Order shall be construed to limit Operation Rescue participants' exercise of their legitimate First Amendment rights; and it is further

ORDERED that the failure to comply with this Order by any Operation Rescue or National Day of Rescue participant with actual notice of the provisions of this Order shall subject them to civil damages of $25,000 per day for any violations of this Order; and it is further

ORDERED that any amounts collected thereunder shall be paid into the Registry of the Court to be disbursed by further Order of the Court; and

Upon application of the City of New York, it is further

ORDERED that in addition to the $25,000 per diem amount ordered above, Operation Rescue or National Day of Rescue participants shall be jointly and severally liable to pay any excess costs incurred by the City of New York as a result of Operation Rescue or National Day of Rescue participants' failure to provide the City with advance notice of the location of their demonstrations, unless Operation Rescue or National Day of Rescue Participants give the New York City Police Department

twelve hours advance notice of the location of each day's demonstrations.

/s/ ROBERT J. WARD
Robert J. Ward

United States District Judge

Dated: New York, New York
October 27, 1988
3:45 P.M.

APPENDIX L

Temporary Restraining Order Dated May 5, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 3071 (RJW)

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN, et al.,

Plaintiffs,

CITY OF NEW YORK,

Plaintiff-Intervenor,

-against-

RANDALL TERRY, et al.,

Defendants.

TEMPORARY RESTRAINING ORDER

Upon the affidavits submitted herein by plaintiffs, plaintiff-intervenor, and defendants, the exhibits attached thereto, the statement of stipulated facts, the summons and complaint,

and all the papers and proceedings herein, and counsel for all parties having appeared and argued before the Court on May 4, 1988, it is hereby

ORDERED that the temporary restraining order issued by Justice Herman Cahn on April 28, 1988, and modified by Justice Cahn on May 2, 1988, is hereby continued as modified as of 8:40 P.M. on May 4, 1988 by order of this Court on the record in open court, and as restated herein in full as follows:

It is hereby

ORDERED that the defendants, the officers, directors, agents and representatives of defendants, and all other persons whomsoever acting in concert with them, and with notice of this order are:

1) enjoined and restrained in any manner or by any means from:

a) trespassing on, blocking, or obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester Counties, from May 2, 1988 to May 7, 1988;

b) physically abusing or tortiously harassing persons entering, leaving, working at, or using any services at any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester Counties, from May 2, 1988 to May 7, 1988. Provided, however, that sidewalk counseling, consisting of reasonably quiet conversation of a nonthreatening nature by not more than two people with each person they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling and that if anyone who wants to, who is sought to be

counseled wants to not have counseling, wants to leave, walk away, they shall have the absolute right to do that.

In addition, provided that this right to sidewalk counseling as defined here shall not limit the right of the Police Department to maintain public order by reasonably necessary rules and regulations as they decide are necessary at each particular demonstration site; and it is further

ORDERED that nothing in this Order shall be construed to limit defendants' exercise of their legitimate First Amendment rights; and it is further

ORDERED that defendants' failure to comply with this Order, shall subject them to civil damages of $25,000 per day for any violations of this Order; and it is further

ORDERED that security in the amount of $5,000.00 be posted by plaintiffs prior to May 6, 1988 at 5:00 P.M.; and further

ORDERED that any amounts collected thereunder shall be paid into the Registry of the Court to be disbursed by further order of the Court; and

Upon application of the City of New York, it is further

ORDERED that in addition to the $25,000 per diem amount ordered above, defendants shall be liable to pay any excess costs incurred by the City of New York as a result of defendants' failure to provide the City with advance notice of the location of their demonstration, unless defendants give the New York City Police Department twelve hours advance notice at the phone number provided to defendants' counsel in open court or the location of each day's demonstration.

Copies of this signed order shall be served upon the Financial Deputy in room 14 and the Clerk in room 18.

/s/ ROBERT J. WARD
Robert J. Ward

United States District Judge

Dated: New York, New York
May 5, 1988
9:45 A.M.

Supreme Court, U.S.
FILED
JAN 24 1994
OFFICE OF THE CLERK

No. 93-828

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

REVEREND ROBERT PEARSON, ET AL.,

Petitioners,

—v.—

PLANNED PARENTHOOD MARGARET SANGER CLINIC (MANHATTAN), ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

DAVID COLE
Center for Constitutional Rights
600 New Jersey Ave., N.W.
Washington, DC 20001
(202) 662-9078

KIM J. LANDSMAN
JAMES M. BERGIN
EILEEN B. HERSHENOV
MORRISON & FOERSTER
1290 Avenue of the Americas
New York, New York 10104
(212) 468-8000

RUTH JONES
(Counsel of Record)
Deborah A. Ellis
NOW Legal Defense & Education Fund
99 Hudson Street
New York, New York 10013
(212) 925-6635

Counsel for Respondents

TABLE OF CONTENTS

Page

Table of Authorities iii

Questions Presented vii

List of Parties viii

Counter Statement of the Case 1

Terry I 2

Terry II 6

Reasons For Denying The Writ 10

I. The Questions for Which Petitioners Seek Certiorari Were Litigated and Decided in Terry I 11

A. The Section 1985(3) Issue Was Decided in Terry I 12

B. The Civil vs. Criminal Contempt Issue Was Decided in Terry I 13

II. Terry I Is Final and May Not Be Attacked on this Appeal from Collateral Proceedings 14

III. The Judgment in Terry I is Res Judicata as to all Petitioners 19

IV. This Appeal from Subsequent Enforcement Proceedings Cannot Reopen Issues Determined in Terry I 21

V. This Case Should Not Be Held Pending a Decision in Bagwell 23

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

Cases

Allen v. McCurry, 449 U.S. 90 (1980) 14

Alpert's Newspaper Delivery Inc. v. New York Times Co., 876 F.2d 266 (2d Cir. 1989) 21

Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931) 17

Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993) . . . . . passim

Brown v. Allen, 344 U.S. 443 (1953) 15

Budinich v. Becton Dickenson & Co., 486 U.S. 196 (1988) 22

Chambers v. Nasco, Inc., 111 S. Ct. 2123 (1991) 27 n.17

Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 17

Commissioner v. Sunnen, 333 U.S. 591 (1948) . 27 n.17

Dwares v. City of New York, 985 F.2d 94 (2d Cir. 1993) 18

Erie R. Co. v. Tompkins, 304 U.S 64 (1938) . . 27 n.17

Expert Electric, Inc. v. Levine, 554 F.2d 1227 (2d Cir.), cert. denied, 434 U.S. 903 (1977) 19

Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981) 15, 17

Guffy v. Smith, 237 U.S. 101 (1915) 27 n.17

Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510 (1993) . . . . . passim

International Union, United Mine Workers v. Bagwell, No. 92-1625, cert. granted, __ U.S. __ (June 1, 1993) (No. 92-1625) 9-10

James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991) 16, 17

Lucero v. Operation Rescue of Birmingham, 954 F.2d 624 (11th Cir. 1992) 20 n.13

Maggio v. Zeitz, 333 U.S. 56 (1948) 22

National Abortions Federation v. Operation Rescue, 8 F.3d 680 (9th Cir. 1993) 18, 20 n.13

National Organization for Women v. Operation Rescue, 816 F. Supp. 729 (D.D.C. 1993) 18

Nevada v. United States, 463 U.S. 110 (1983) 19

New York State Nat'l Org. for Women v. Terry, 697 F. Supp. 1324 (S.D.N.Y. 1988), and 704 F. Supp. 1247 (S.D.N.Y.), appeals consolidated and aff'd as modified, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990) . . . . . passim

New York State Nat'l Org. for Women v. Terry, 732 F. Supp 388 (S.D.N.Y. 1990) and 737 F. Supp. 1350 (S.D.N.Y. 1990), appeals consolidated and aff'd, 961 F.2d 390 (2d Cir. 1992), cert. granted, judgment vacated, and remanded in light of Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993), and reinstating judgment on remand, 996 F.2d 1351 (2d Cir. 1993) . . . . . passim

Osterneck v. Ernst & Whinney, 489 U.S. 169 (1989) . 22

Pro-choice Network of Western New York v. Walker, 994 F.2d 989 (2d Cir.), cert. denied sub nom. Syversen v. Summit Women's Ctr., 114 S. Ct. 185 (1993) 15

Regal Knitwear Co. v. National Labor Relations Board, 324 U.S. 9 (1945) 20

Roe v. Operation Rescue, 919 F.2d 857 (3d Cir. 1990) 20 n.13

Spallone v. United States, 493 U.S. 265 (1990) 11, 27 n.17

Stern v. South Chester Tube Co., 390 U.S. 606 (1968) 27 n.17

Stone v. Williams, 970 F.2d 1043 (2d Cir. 1992), cert. denied, 113 S. Ct. 2331 (1993) 19

Talluto v. Planned Parenthood Margaret Sanger Clinic, cert. denied, 112 S. Ct. 957 (1992) 7

Teague v. Lane, 489 U.S. 288 (1989) 17 n.10, 23

3855 B'way Laundromat, Inc. v. 600 W. 161st St. Corp., 156 A.D.2d 202, 548 N.Y.S.2d 461 (1st Dep't 1989) 27-28 n.17

Town of West Hartford v. Operation Rescue, 991 F.2d 1039 (2d Cir. 1993) 18

United States v. Rylander, 460 U.S. 752 (1983) 22

Virginia Nat'l Org. for Women v. Operation Rescue, 914 F.2d 582 (4th Cir. 1990), rev'd in part and aff'd in part sub nom. Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993) 20 n.13

White v. New Hampshire Dep't of Employment Security, 455 U.S. 445 (1982) 22

Statutes

42 U.S.C.

§ 1985(3) . . . . . passim

§ 1988 . . . . . passim

S. Ct. Rule 10.1 . . . . . 10, 18

Questions Presented

I. Whether on remand from this Court the Court of Appeals for the Second Circuit correctly reinstated its opinion, finding that applications for further relief from that judgment should be made to the District Court.

II. Whether Petitioners are barred in these collateral proceedings from relitigating the merits of the underlying injunction which is part of a final judgment in prior litigation.

List of Parties

Respondents accept Petitioners' list of the parties. In accordance with Rule 28.1 of the Rules of this Court, Respondents report that Eastern Women's Center, Inc., Planned Parenthood of New York City, Inc., New York State National Abortion Rights Action League ("NARAL"), Inc., Religious Coalition for Abortion Rights - New York Metropolitan Area, and the National Organization for Women are corporations. None of them have parent or subsidiary companies, but New York State NARAL, Inc. is affiliated with the National Abortion Rights Action League, Inc. and Planned Parenthood of New York City, Inc. is affiliated with Planned Parenthood Federation of America, Inc.

Counter Statement of the Case

Petitioners' statement of the case contains numerous misstatements of fact and law and Respondents do not adopt it.

Petitioners are eight individuals and two organizations who were held in contempt for knowingly violating one or more injunctive orders, including a permanent injunction (collectively, the "injunction"), issued by the United States District Court for the Southern District of New York. The injunction prohibits Petitioners from blocking access to women's health clinics where abortions are performed in New York City and in Westchester, Suffolk and Nassau counties in New York State.

The injunction was incorporated in a final judgment entered by the District Court in 1989. The injunction provides for prospective sanctions (including attorney's fees) for violations of its terms. The District Court's final judgment and the injunction were unanimously affirmed by the United States Court of Appeals for the Second Circuit in 1989. A petition to this Court for a writ of certiorari was denied in 1990. That action, denominated "Terry I," is reported as New York State Nat'l Org. for Women v. Terry, 697 F. Supp. 1324 (S.D.N.Y. 1988) and id., 704 F. Supp. 1247 (S.D.N.Y.), appeals consolidated and aff'd as modified, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990).

The petition for certiorari now before the Court is from collateral proceedings brought by plaintiffs (collectively, "N.O.W.") for contempt sanctions (including attorney's fees) for violating the injunction, and for prevailing party attorney's fees under 42 U.S.C. § 1988. These proceedings, denominated "Terry II," are reported at 732

F. Supp. 388 and 737 F. Supp. 1350 (S.D.N.Y. 1990), appeals consolidated and aff'd, 961 F.2d 390 (2d Cir. 1992), cert. granted, judgment vacated, and remanded for reconsideration in light of Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993), and reinstating judgment on remand, 996 F.2d 1351 (2d Cir. 1993). The present Petitioners include three of the named defendants in Terry I (Operation Rescue, Terry, and Herlihy), and seven non-party contemnors found to have violated the injunction in concert with the named defendants.

The petition seeks review of an order of the Court of Appeals reinstating its initial judgment pursuant to its prior opinion and holding that "[a]pplications for such relief in light of Bray[v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993),] as dismissal of the federal claims, a remand of the action to state court, or reconsideration of the contempt sanctions litigated on this appeal should be addressed in the first instance to the district court." Petition App. at A-3, A-6. As described below, each of the questions raised by Petitioners was fully litigated and finally determined in Terry I. Respondents contend that these issues may not be relitigated in collateral proceedings, that the actions of the Court of Appeals on remand were correct and, therefore, that the petition should be denied.

TERRY I

Plaintiffs initially brought this action in state court.[1]

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[1] The complaint (and the amended complaint) states seven state law causes of action and one federal claim under 42 U.S.C. § 1985(3). Respondent's App. at A-13, A-30.

Defendants removed to the United States District Court for the Southern District of New York on May 3, 1988, after the state court judge had issued two temporary restraining orders in response to defendants' demonstrations blocking access to certain women's health clinics. Petition App. at A-96. The second of the state court orders, issued on May 2, 1988, enjoined defendants from "trespassing on, blocking, obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk or Westchester Counties." Id. at A-95-A-96. On May 3, 1988, the same day that defendants removed the action to federal court, defendants Terry and Operation Rescue violated the order by blocking access to an abortion clinic. Id. at A-96.

As a result of Terry's and Operation Rescue's complete disregard for the state court's temporary restraining order, the District Court decided on May 4, 1988, to continue and adopt that order, but modified it to add coercive sanctions of $25,000 for each subsequent daily violation.[2] Terry I, 697 F. Supp. at 1330; Petition App. at A-96. The contempt continued on May 5 and 6, when Operation Rescue once again blocked access to medical facilities in Long Island and New York City, respectively. 697 F. Supp. at 1331. Thereafter, plaintiffs moved for civil contempt sanctions against Terry and Operation Rescue for violating the District Court's injunction.

Neither Terry nor Operation Rescue challenged any facts relating to the contempt. Terry's and Operation

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[2] The state court order was also modified to require defendants to notify plaintiff-intervenor New York City in advance of any demonstrations.

Rescue's opposition to the contempt motion included the same legal argument they seek to raise in this collateral proceeding: they argued that contempt fines assessed after the completion of acts violating a "prohibitory" injunction are by definition criminal penalties because the contumacious acts cannot be undone or "purged." Id. at 1329-30. Defendants maintained that because the fines were criminal penalties, they could not be imposed without affording the accused contemnors such rights as a jury trial prosecuted by the U.S. Attorney's office and the benefit of the criminal law standard of proof.

The District Court considered and rejected this argument, and imposed $50,000 in civil contempt fines jointly and severally against Terry and Operation Rescue to be paid to plaintiffs.[3] The court ruled that the prospective civil contempt sanctions were designed to enforce a court order and that defendants had been given ample opportunity to avoid the fines by complying with that order. Id. On the same day, October 27, 1988, the District Court converted the temporary restraining order into a preliminary injunction.

On January 10, 1989, the court granted summary judgment to plaintiffs on their § 1985(3) and state law nuisance and trespass claims, and entered a permanent injunction. Terry I, 704 F. Supp. 1247 (S.D.N.Y. 1989). In opposition to plaintiffs' summary judgment motion, the defendants unsuccessfully raised another argument they now

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[3] The court also assessed $19,141.00 for costs payable to the City resulting from defendants' failure to provide advance notification of the location of the demonstrations. Petition App. at A-98.

seek to bring before this Court: that N.O.W.'s federal claim did not state a cause of action under 42 U.S.C. § 1985(3). Id. at 1258-60.

The Court of Appeals consolidated defendants' appeals from the summary judgment order and the contempt order, and unanimously upheld both.[4] Terry I, 886 F.2d 1329. The Court of Appeals held that "[t]he prospectively fixed penalties were plainly intended to coerce compliance with the Court's order and to preserve the parties' then-existing legal rights" and were therefore civil.[5] Terry I, 886 F.2d at 1350-51 (citation omitted). The appellate court also held that the District Court had properly issued a permanent injunction. Id. at 1362-64. The Court of Appeals further rejected defendants' arguments against the claim based on § 1985(3), and affirmed summary judgment on N.O.W.'s federal and state law causes of action. Id. at 1361-62.

Defendants petitioned this Court for a writ of certiorari, renewing their arguments that the contempt fines were criminal in nature, Respondents' App. at A-55-A-58, and that plaintiffs' complaint failed to state a cause of action under § 1985(3). Id. at 5-11. This Court denied certiorari. 495 U.S. 947.

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[4] These appeals were also consolidated with an appeal of an interlocutory order granting sanctions against defendants for failure to provide discovery. Terry I, 886 F.2d 1345, 1354-57.

[5] The one modification made by the Court of Appeals was to direct that the $50,000 in contempt fines would be payable to the U.S. Treasury instead of to N.O.W.

TERRY II

Plaintiffs initiated these collateral proceedings (Terry II) by moving for contempt for multiple violations of the injunction against defendants Operation Rescue, Terry and Herlihy, and ten non-parties, seven of whom are Petitioners here: Pearson, Lee, Foreman, McMonagle, White, Slattery and Bistate Operation Rescue Network (B.O.R.N.). Of these, only Pearson denied acting with notice of the injunction.[6] The District Court made extensive findings detailing the knowledge each non-party contemnor had of the injunction, the close association that existed between the non-parties and the defendants, and the fact that the non-parties acted in concert with defendants. Petition App. at A-110, A-119-A-134. The District Court concluded and Petitioners no longer dispute that the injunction bound each of them.[7] The Terry II contemnors renewed their challenge to the fines previously litigated and rejected in Terry I, and again contended that the contempt sanctions were criminal because they were being punished for past conduct rather than being coerced into compliance. Petition App. at A-106-A-107, A-111-A-112. They also argued that plaintiffs failed to state a claim under § 1985(3). Applying

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[6] The District Court held hearings before finding Pearson and Slattery in contempt. Petition App. at A-38-A-39 and A-132-A-134.

[7] The District Court made all of the additional findings necessary under Fed. R. Civ. P. 65 to support holding the defendants and non-parties in contempt. Petition App. at A-108-A-134. Petitioners do not raise any of those determinations before this Court.

the holding in Terry I, the District Court rejected both arguments, Petition App. at A-106, and the Terry II contemnors appealed.

After the District Court's decision holding defendants and non-party Petitioners in contempt, N.O.W. moved for attorney's fees against defendants pursuant to 42 U.S.C. § 1988. Plaintiffs also sought attorney's fees from defendants and non-party contemnors for the cost of bringing the contempt motion.

The defendants conceded that N.O.W. was a "prevailing party," but argued that "special circumstances exist which render a fee award in this case unjust." Petition App. at A-64-A-65. The District Court rejected this and other arguments, and awarded prevailing party attorney's fees against defendants, and additional attorney's fees pursuant to the injunction against defendants and non-party contemnors. Defendants and non-party contemnors appealed, and this was consolidated with their earlier appeal of the contempt sanctions.

While this appeal was pending in the Court of Appeals, Petitioners filed a writ of certiorari requesting this Court to review the underlying judgment and injunction "contemporaneously with Bray, or at least [to hold the case] for disposition pending decision in Bray." Respondents' App. A-86. That petition, the first of three filed to date by Petitioners in the Terry II proceedings, was denied on January 21, 1992. Talluto v. Planned Parenthood Margaret Sanger Clinic, 112 S. Ct. 957 (1992).

On April 13, 1992, the Court of Appeals affirmed the District Court's award of attorney's fees under § 1988 and upheld the contempt sanctions against the Petitioners. Petition Appendix D. The appellate court ruled that both

the viability of plaintiffs' federal civil rights claims and the merits of the injunction (including the civil nature of the contempt fines) had been decided in Terry I and relitigation of those issues was foreclosed. Petition App. at A-19-A-20.

The Court of Appeals noted that the Supreme Court was considering Bray at the time the decision in Terry II was rendered, but expressly stated that a reversal in Bray was unlikely to have any effect on the underlying injunction because that injunction was also premised on the separate and independent state grounds of public nuisance and trespass. Id. at A-20-A-22. The appellate court stressed that Petitioners would only benefit from a ruling in Bray that rejected a federal § 1985(3) claim against abortion clinic trespassers if this Court also found that plaintiffs' federal cause of action had been so insubstantial as to deprive federal courts of their pendent jurisdiction over any state law claims. Id. at A-22.[8] In August 1992, the Petitioners filed their second petition for certiorari in Terry II, in which they raised the same challenges to the federal law basis for the underlying injunction and to the imposition of civil contempt sanctions.

This Court decided Bray on January 13, 1993. The Court held that, on the record before it, the respondents in that case had not stated a claim under the deprivation clause of § 1985(3), but the Court expressly held that suits stating the same claim under § 1985(3) brought prior to the decision in Bray were not so "wholly insubstantial and

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[8] Petitioners do not, in fact, contest the District Court's jurisdiction and explicitly reject any suggestion that they seek a remand to state court. Petition at 25 n.14.

frivolous" as to deprive a district court of jurisdiction. Bray, 113 S. Ct. at 768. On February 22, 1993, the Court granted certiorari in Terry II, vacated the judgment below, and remanded the case for further consideration in light of Bray. Petition App. at A-7.

The Court of Appeals requested the parties to submit letter briefs regarding the proper disposition of Terry II upon remand.[9] In a July 2, 1993, per curiam decision, the Court of Appeals reinstated its initial judgment and suggested that Petitioners should address applications for relief such as dismissal of the federal claims, remand to state court, or reconsideration of the contempt sanctions previously litigated to the District Court in the first instance. Petition App. at A-5-A-6. Petitioners moved for a rehearing in banc on July 16, 1993, which the Court of Appeals denied on August 23, 1993.

Ignoring the suggestion of the Court of Appeals, Petitioners now seek review by this Court for a third time, but raise the same challenges to the contempt sanctions and the § 1985(3) claim that the District Court decided adversely to defendants in Terry I. This time Petitioners, in an effort to link their collateral attack on the injunction to a case in which the Court has granted certiorari, copied verbatim the question presented in an unrelated case, International Union, United Mine Workers of America v. Bagwell, No. 92-1625, which was argued on November 29,

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[9] N.O.W. argued in its brief that Bray did not affect the issues before the Court of Appeals in this collateral contempt and fees litigation and, therefore, that any request for relief from the underlying injunction must be directed to the District Court pursuant to Rule 60(b) of the Federal Rules of Procedure.

1993. Petitioners have asked the Court to consider this case with Bagwell, or to hold it pending Bagwell's resolution.

Reasons For Denying The Writ

Petitioners have not presented any "special and important reasons" for granting the writ. S. Ct. R. 10.1. The Court of Appeals' decision reinstating its former mandate is not contrary to this Court's ruling or in conflict with the decision of any other Court of Appeals, and it is fully supported by important public policies of finality.

The petition's fundamental flaw is its failure to acknowledge the collateral nature of this proceeding. This petition for a writ of certiorari represents only the latest of Petitioners' numerous attempts to mount a collateral attack on a final judgment and permanent injunction entered years ago by the District Court in Terry I, affirmed in all relevant respects by the Court of Appeals for the Second Circuit, and for which certiorari was denied by this Court. Terry I is therefore res judicata, and it would undermine long-settled principles of finality for this Court even to consider the questions stated in the petition for writ of certiorari.

Petitioners' argument that the Court of Appeals did not properly apply the rule of Bray on remand is simply misplaced. Bray has no effect on Terry I, because the retroactive effect of new decisions is expressly limited to matters still pending on direct appeal, and does not apply to collateral attacks on final judgments. See Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510 (1993). Moreover, there is no occasion for this Court to revisit the well-settled rule that one may not challenge the merits of an injunction by violating it. Because the merits of Terry I can only be reconsidered in the District Court under Rule

60(b), the Court of Appeals properly reinstated its prior judgment and advised Petitioners that any application for further relief should be "addressed in the first instance to the District Court." Petition App. at A-6.

Petitioners have also misrepresented the contempt proceedings below in an attempt to link their case to a currently pending case argued to the Court on November 29, 1993: International Union, United Mine Workers of America v. Bagwell, No. 92-1625. This Court's grant of certiorari in Bagwell is of no benefit to the Petitioners, because the allegedly identical issue -- the distinction between civil and criminal contempt -- was finally decided in Terry I and is not properly before the Court. Because that issue is no longer open on direct appeal, Bagwell can have no effect on these proceedings, regardless of its outcome. As with Terry I's resolution of the § 1985(3) issues, the fact that the Court granted certiorari in a later case on the contempt question does not allow Petitioners to evade the res judicata effect of a final judgment.

I.

The Questions for Which Petitioners Seek Certiorari Were Litigated and Decided In Terry I.

Each of the questions Petitioners seek to bring before this Court was fully litigated and finally determined in Terry I, and Petitioners may not, simply through persistent disobedience of the injunction, circumvent the ordinary rules of finality.

Here, as in Spallone v. United States, 493 U.S. 265, 273 (1990),

> [t]he issue before [the Court] is relatively narrow.

> There can be no question about the liability of [the defendants]: the District Court imposed such liability on [the defendants]; its decision was affirmed in all respects by the Court of Appeals, and we denied certiorari. Nor do we have before us any question as to the District Court's remedial order; the Court of Appeals found that it was within the bounds of proper discretion, . . . and we denied certiorari.

The merits underlying the injunction, the sanctions for violating it, and the question whether plaintiffs were the prevailing parties were all resolved by the District Court in Terry I. The Court of Appeals affirmed and this Court denied certiorari. Since the Petitioners present no other issues that were not already determined in Terry I, there is no issue properly before this Court at this time, and the Court of Appeals was correct to advise Petitioners that their only recourse was in the District Court.

A. The Section 1985(3) Issue Was Decided in Terry I.

In an effort to convince this Court to revisit the merits of Terry I, Petitioners state, incorrectly, that Terry II affirmed "the merits of Respondents' § 1985 claims," Petition at 22, and held that "42 U.S.C. § 1985(3) provides a cause of action for obstructing access to abortion businesses." Id. In fact, these issues were decided in Terry I, see 886 F.2d 1339, 1357-62, and the Court of Appeals in Terry II correctly declined to revisit them. Petition App. at A-19-A-22.

The District Court in Terry I plainly considered Petitioners' question as to whether "§ 1985(3) . . . provide[s] a cause of action against anti-abortion demonstrators for obstructing access to abortion

businesses," Petition at ii, and the Court concluded that it did. 704 F. Supp. at 1258-60. The Court of Appeals considered the same question on appeal, 886 F.2d at 1357-59, and affirmed the District Court's ruling. Petitioners squarely raised this issue as the first question in their petition for certiorari in Terry I, see Respondents' App. at A-47-A-53, and this Court denied the petition. In short, Petitioners had all the opportunity to litigate this issue that the law provides, and they lost at every level.

B. The Civil vs. Criminal Contempt Issue Was Decided in Terry I.

The Court of Appeals correctly held in Terry II that the civil-criminal contempt issue had been adjudicated in Terry I:

> [Appellants] argue that the contempt fines imposed by the district court were criminal, rather than civil, in nature, and that appellants were not accorded procedural protections required in criminal contempt proceedings; we ruled to the contrary in Terry I.

Petition App. at A-20.

That holding is completely supported by the record. When Respondents moved for contempt in response to the violations by Petitioners Terry and Operation Rescue of the May 4, 1988, temporary restraining order, those Petitioners opposed the motion on the same grounds they and the other Petitioners seek to raise here: that prospective contempt fines, assessed after violations of an injunction, constitute criminal penalties that can only be imposed after affording Petitioners the full panoply of due process protections available to criminal defendants. Terry I, 697 F. Supp. at 1329-30. Petitioners renewed this argument in the Court of

Appeals, again without success. Terry I, 886 F.2d at 1350-1351. This Court denied certiorari. 495 U.S. 947. Thereafter, the merits of the injunction were simply no longer open to challenge. See, e.g., Allen v. McCurry, 449 U.S. 90 (1980) (res judicata bars relitigation of any claim between parties where there was previously a judgment on the merits).

II.

Terry I Is Final and May Not Be Attacked on this Appeal from Collateral Proceedings.

The District Court in Terry I granted summary judgment against all defendants on the merits, and that decision is final. The court awarded the substantive relief plaintiffs sought: a permanent injunction (a) prohibiting Petitioners from barring access to facilities performing abortions, (b) prohibiting Petitioners from harassing women seeking to obtain abortions at such facilities, and (c) imposing prospective civil penalties (including attorney's fees) for violations of the injunction. Terry I, 704 F. Supp. at 1264; Respondents' App. at A-30-A-31. The decision left nothing to be decided, except matters of enforcement and other collateral issues, including award of attorney's fees, that might flow from the judgment itself. Therefore, the District Court's decision in Terry I was final in every regard.

Petitioners conceded the finality of the District Court's summary judgment order in their briefs on appeal in Terry I. See Respondents' App. at A-109 (Supplemental Brief for Defendants-Appellants) (District Court's decision on the merits granted "final and permanent relief"). The Court of Appeals' opinion in Terry I further shows that the District Court's summary judgment order was final,

because that judgment brought up on appeal certain interlocutory orders which, by themselves, were "unchallengeable by appeal until final judgment." 886 F.2d at 1350. Indeed, if the judgment had not been final, the Court of Appeals would have had no jurisdiction to review the District Court's earlier interlocutory orders. See Pro-choice Network of Western New York v. Walker, 994 F.2d 989, 994-95 (2d Cir. 1993) (no jurisdiction to review interlocutory civil contempt order), cert. denied sub nom. Syversen v. Summit Women's Ctr., 114 S. Ct. 185 (1993).

This Court's denial of Petitioners' request for a writ of certiorari, 495 U.S. 947, while not a determination on the merits, brought an end to any opportunity for direct review of the District Court's final judgment. As Justice Jackson noted in Brown v. Allen, 344 U.S. 443, 543 (1953) (concurring opinion):

> The fatal sentence that in real life writes finis to many causes cannot in legal theory be a complete blank. . . . [F]or the case in which certiorari is denied, its minimum meaning is that this Court allows the judgment below to stand with whatever consequences it may have upon the litigants involved under the doctrine of res judicata. . . . A civil or criminal judgment usually becomes res judicata in the sense that it is binding and conclusive even if new facts are discovered and even if a new theory of law were thought up . . . .

The res judicata consequences of a final judgment on the merits are not "altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981). Therefore, neither this Court's decision last year in

Bray nor any decision this Court may make in the Bagwell case can have any effect on the finality of the judgment in Terry I.

The rule of full retroactivity of this Court's decisions applies only to direct appeals, not to collateral proceedings such as this. See Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2517 (1993); James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991). In Harper, this Court held that when the Court applies a rule of federal law to the parties before it, that rule

> must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Harper, 113 S. Ct. at 2517 (emphasis added).

Petitioners treat Harper as if it referred simply to "all cases" and "all events," Petition at 21, and leave out the crucial phrase that restricts its holding to cases "still open on direct review." That qualifier is, however, critical, and is the reason why Bray has no effect on this case: Harper has no application to a collateral attack on a final judgment such as Petitioners attempt here.

Harper did not purport to make new law, but instead relied on Beam. That reliance highlights the distinction between direct review and collateral attack. In Beam, a majority of the Justices (in four separate opinions, none commanding a majority) endorsed a rule of full retroactivity for all cases then on direct review. At the same time, several members of the Court explicitly noted that the rule of retroactivity stopped short at the bar of res judicata. For example, Justice Souter's opinion in Beam, joined by

Justice Stevens, noted that

> [o]f course, retroactivity in civil cases must be limited by the need for finality, see, Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 60 S. Ct. 317, 84 L. Ed. 329 (1940); once suit is barred by res judicata or by statutes of limitation or repose, a new rule cannot reopen the door already closed.

Beam, 111 S. Ct. at 2446. Any perceived harshness of this result is counterbalanced by the public interest in the finality of judgments:

> This Court has long recognized that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of that contest, and that matters once tried shall be considered forever settled as between the parties."

Federated Department Stores v. Moitie, 452 U.S. 394, 401 (1981) (quoting Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 525 (1931)).[10]

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[10] Nothing in the facts or rationale of either Harper or Beam suggests that the rule of full retroactivity is available on collateral attack. On the contrary, Justice Scalia's concurrence in Harper specifically discussed the difference between standards of retroactivity on direct appeal and collateral review. Harper, 113 S. Ct. at 2520-21 (Scalia, J., concurring) (discussing Teague v. Lane, 489 U.S. 288 (1989)). Indeed, Petitioners apparently concede that a final judgment is not vulnerable to collateral attack merely because of a subsequent change in law. See Petition at 21 ("by reinstating its prior judgment, the Court of Appeals has in effect entered a final judgment . . . , thereby

Because Bray has no direct application to a final decision such as Terry I, the decision of the Court of Appeals reinstating its judgment does not conflict with the decision of any other circuit court that applied Bray on a direct appeal. See, e.g., National Abortions Federation v. Operation Rescue, 8 F.3d 680 (9th Cir. 1993) (finding Bray required dismissal of claim under § 1985(3)'s deprivation clause, but not under hindrance clause). For the same reason, the Court of Appeals' decision is not in conflict with subsequent proceedings in Bray. See National Organization for Women v. Operation Rescue, 816 F. Supp. 729 (D.D.C. 1993) (on remand, district court upheld pendent jurisdiction in light of Bray, rejected request to vacate injunction, and held defendants in contempt). Nor does the Court of Appeals' decision conflict with other decisions of the Court of Appeals for the Second Circuit itself. Town of West Hartford v. Operation Rescue, 991 F.2d 1039 (2d Cir. 1993), amply demonstrates that the Court of Appeals for the Second Circuit does apply Bray retroactively to cases still open on direct review. See West Hartford, 991 F.2d at 1045-49. See also Dwares v. City of New York, 985 F.2d 94, 101 (2d Cir. 1993). Consequently, there is no "special and important" reason to grant certiorari in this case. S. Ct. R. 10.1.

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rendering any application to the District Court futile") (emphasis in original). Petitioners fail to acknowledge, however, that it is Terry I that is the final judgment.

III.

The Judgment in Terry I is Res Judicata as to all Petitioners.

Non-party Petitioners Pearson, Lee, Foreman, McMonagle, White, Slattery and B.O.R.N., who were not directly involved in Terry I, do not contend in this Court that Terry I is not res judicata as to them, and any such argument would be futile. Where, as here, the claim being litigated is the same as that decided in the prior litigation and where a close relationship exists between parties and non-parties such that the interests of the non-parties were effectively represented before the court, the resulting judgment is res judicata against both party and non-party.[11] See, e.g., Nevada v. United States, 463 U.S. 110, 129 (1983) (persons in privity with party barred by doctrine of res judicata are similarly barred from relitigating claims); Stone v. Williams, 970 F.2d 1043, 1060 (2d Cir. 1992) (due process does not require matters to be relitigated at behest of one whose legal interests were fairly represented in prior proceeding), cert. denied, 113 S. Ct. 2331 (1993); Expert Electric, Inc. v. Levine, 554 F.2d 1227 (2d Cir.) (individuals are bound by judgments entered against representative association where individuals' interests were advanced by association in earlier litigation), cert. denied, 434 U.S. 903 (1977).

Here, the District Court's extensive factual findings under Rule 65(d) demonstrate the necessary elements of

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[11] In any event, non-party Petitioners may not relitigate the validity of attorney's fees awarded under 42 U.S.C. § 1988, because those fees were only assessed against the defendants. Petition App. at A-87.

privity between party and non-party Petitioners. Cf. Regal Knitwear Co. v. National Labor Relations Board, 324 U.S. 9, 14 (1945) (Rule 65 is derived from concept of privity). In particular, the District Court detailed the close association between each of the non-party Petitioners and Operation Rescue. The court found that Operation Rescue had called for, coordinated and led all of the demonstrations at which the Petitioners violated the injunction.[12] The court made findings regarding the control Operation Rescue and Randall Terry exercised over the non-parties and the manner in which the non-parties acted in concert with the named defendants to violate the injunction after receiving notice of it.[13] Petition App. at A-110, A-119-A-134.

Nor can there be any argument that the interests of the

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[12] The Court of Appeals had previously found that Operation Rescue "tacitly enrolls members." Terry I, 886 F.2d at 1352.

[13] The close and ongoing association between the parties and non-parties is further underscored by the numerous cases around the country where various combinations of these same Petitioners have participated in similar blockades of abortion clinics coordinated by Operation Rescue and have been named repeatedly as defendants in litigation similar to this. See, e.g., National Abortions Federation v. Operation Rescue, 8 F.3d 680 (9th Cir. 1993); Lucero v. Operation Rescue of Birmingham, 954 F.2d 624 (11th Cir. 1992); Roe v. Operation Rescue, 919 F.2d 857 (3d Cir. 1990); Virginia Nat'l Org. for Women v. Operation Rescue, 914 F.2d 582 (4th Cir. 1990), rev'd in part and aff'd in part sub nom. Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993).

non-parties in challenging the legal basis for upholding the civil contempt sanctions were not assiduously represented by the parties' counsel in Terry I. Indeed, all but one of the non-party Petitioners (and all three of the party-Petitioners) were represented in the Court of Appeals by the same counsel who represented defendants Randall Terry and Operation Rescue in Terry I.[14] See Alpert's Newspaper Delivery Inc. v. New York Times Co., 876 F.2d 266, 271 (2d Cir. 1989) (where two groups of litigants used the same attorneys, litigation strategy was centrally coordinated, and the allegations were identical, sufficient identity of parties existed to bar relitigation of previously raised claims).

The Petitioners not parties to Terry I do not seek to challenge the reach of Terry I in their petition, Petition App. at A-24-A-25, and in any event have not established a record that would enable this Court to address this issue. As a result, the decision in Terry I is res judicata as to both party and non-party Petitioners, and all Petitioners are precluded from relitigating the merits of Terry I in this forum.

IV.

This Appeal from Subsequent Enforcement Proceedings Cannot Reopen Issues Determined in Terry I.

The District Court's subsequent award of attorney's fees pursuant to 42 U.S.C. § 1988 and additional contempt

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[14] Petition App. at A-5, A-10. In addition, Terry, Operation Rescue, Herlihy, McMonagle, and White were represented by the same counsel in the District Court. Petition App. at A-56.

sanctions for violation of the permanent injunction in no way impaired the finality of the judgment in Terry I. In White v. New Hampshire Dep't of Employment Security, 455 U.S. 445, 451-52 (1982), this Court "all but held" that "a request for attorney's fees under 42 U.S.C. § 1988" did not prevent the underlying order from being final. Budinich v. Becton Dickenson & Co., 486 U.S. 196, 199-200 (1988). Budinich confirmed that that holding "was based on our conclusion that 'a request for attorney's fees under § 1988 raises legal issues collateral to' and 'separate from' the decision on the merits," id. at 200 (quoting White, 455 U.S. at 451-52), and established "a uniform rule that an unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final." Id. at 202. See also Osterneck v. Ernst & Whinney, 489 U.S. 169, 174, (1989) (attorney's fee award is uniquely separable from the underlying merits of the controversy). Therefore, Petitioners may not reopen the merits of the judgment in an appeal from the attorney's fee award.

Similarly, violating the injunction does not give Respondents another opportunity to litigate the permanent injunction. "A contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy." United States v. Rylander, 460 U.S. 752, 756 (1983) (quoting Maggio v. Zeitz, 333 U.S. 56 (1948)). The reason for this was adamantly stated in Maggio: "The procedure to enforce a court's order commanding or forbidding an act should not be so inconclusive as to foster experimentation with disobedience." 333 U.S. at 69. Rather, where, as here, an action has resulted in "a final order, it becomes res judicata and is not subject to collateral attack in the contempt proceedings." Id., 333 U.S. at 68.

V.

This Case Should Not be Held Pending A Decision in Bagwell.

Because Bagwell has already been fully briefed and argued, consolidation of the two cases is not feasible. In any event, no benefit would be gained by holding this case pending resolution of Bagwell, regardless of its outcome. If the Court finds the Bagwell fines to be civil, that decision clearly will not affect the contempt judgments in this case. If the Court decides in Bagwell that fines imposed pursuant to a previously established fee schedule constitute criminal penalties, that determination also will have no effect on these proceedings, because Bagwell will not have automatic retroactive application to the contempt sanctions in Terry I. See Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510 (1993); Teague v. Lane, 489 U.S. 288 (1989).[15] Under these circumstances, denying this petition will in no way "tip the hand" of the Court as to its views of the merits of Bagwell.

Moreover, this case is factually different from Bagwell in several significant respects. Unlike the petitioners in Bagwell, Petitioners cannot plausibly raise any question at this time regarding the appropriateness of the amount of sanctions. The District Court in Terry I made a substantial inquiry into the financial ability of the defendants to pay the

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[15] Denial of certiorari does not leave Petitioners without recourse if the Bagwell contempt fines are found to be criminal in nature. Petitioners may file a motion before the District Court pursuant to Fed. R. Civ. P. 60(b) seeking to obtain relief from the final judgment in Terry I.

sanctions provided for in the injunction. 697 F. Supp. at 1333, 1352-53. Defendant Terry declined to provide the court with his personal financial information, id. at 1333 & n.10, and, in his capacity as Operation Rescue's custodian of records, refused to answer discovery requests regarding Operation Rescue's finances and assets. Terry I, 886 F.2d at 1354-57. With one exception, the Petitioners in Terry II did not claim an inability to pay at the time the District Court imposed contempt sanctions. Petition App. at A-105-A-107, A-111-A-124 (listing contemnors' arguments).[16] Having failed to raise this issue below, Petitioners should not be permitted to argue that the sheer size of the fines is so burdensome as to amount to punitive sanctions. See Petition at 10 (urging Court to grant certiorari or hold case pending Bagwell "[i]n view of the excessive monetary penalties").

Moreover, the amount of the fines imposed on Petitioners, while significant, simply bears no comparison to the $52 million dollar sanctions imposed in Bagwell. Here, individual Petitioners were fined in amounts ranging from $25,000 to $100,000, with additional contempt-related attorney's fees ranging from approximately $3,000 to approximately $22,000, with most attorney's fee awards in the range from $6,000 to $12,000. Contrary to Petitioners' arguments, Petition at 10, the size of these sanctions is in no way comparable to Bagwell, and simply does not warrant the conclusion that the sanctions are punitive in nature.

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[16] The only Petitioner in Terry II to raise a question regarding inability to pay the fines was Slattery, a portion of whose fine was subsequently stayed. Petition App. at A-50-A-51.

In Bagwell, the trial court held the International and local unions of the United Mine Workers of America (collectively, the "Union") in contempt of its injunction. In order to induce the Union to comply, the court set a schedule of prospective civil fines of $100,000 for each violent violation and $20,000 for each non-violent violation. The fines were to double each day, without limitation. Petitioner's Brief at 3, Bagwell, No. 92-1625 (citing trial court order). The court eventually imposed fines totalling over $64 million and, after reductions, amounting to $52 million.

The trial court in Bagwell apparently imposed sanctions on the Union for violent acts of individuals who were never demonstrated to be union members. See Petitioner's Petition for Certiorari at 3 & n.1; Petitioner's Brief at 3-4 & n.1 Bagwell, No. 92-1625. Moreover, after the underlying labor dispute was settled and both parties to the litigation asked the court to vacate its contempt sanctions, the court refused to vacate $52 million in fines, in part because it found that the Union's conduct had been aimed at the state of Virginia at large and had affected "members of the public . . . who had no connection with any of the litigants," causing the state authorities to mobilize massive resources to maintain order. Government's Amicus Brief in Support of Respondent Bagwell, Bagwell, No. 92-1625 (quoting trial court decision). Finally, the size of the fines in Bagwell might raise a question of whether the sheer magnitude of the sanctions somehow renders them punitive.

None of these factors are present in Terry II; on the contrary, the District Court took great pains to ensure that the sanctions were directed at the appropriate persons, were calculated to achieve a coercive purpose, and were appropriate in amount. In contrast to Bagwell, the District Court here only imposed sanctions on Operation Rescue and

non-party Petitioners for each person's own actions in organizing and carrying out demonstrations in violation of the injunction. See Terry I, 697 F. Supp. at 1331. Unlike the Union in Bagwell, neither Operation Rescue nor non-party Petitioners was fined for the acts of others, and particularly not for the acts of unidentified persons not shown to be members of an organizational defendant. Rather, the contemnors in Terry II were each held accountable for their own violations. Petition App. at A-124-A-134.

The District Court showed an appropriate flexibility in enforcing the contempt sanctions in order to achieve their coercive purpose. For example, the court did not initially impose doubling of penalties, but only did so after its earlier sanctions were shown to be ineffective as a deterrent. Terry I, 704 F. Supp. at 1263-64. Moreover, the District Court agreed to stay enforcement of half of the sanctions imposed on non-party Petitioner Slattery, as long as Slattery refrained from future violations of the injunction. Petition App. at A-50-A-51. By contrast, the court in Bagwell refused to abate the penalties after they could serve no further coercive purpose, and even after the party that initially moved for contempt requested that the fines be vacated.

In this case, the prospective sanctions were not only legitimate when imposed, they continue to be necessary to enforce future compliance with the court's mandate. Operation Rescue clearly has not renounced its policy of closing down clinics through unlawful blockades, as demonstrated by the many clinic blockades around the country initiated and led by Operation Rescue and other Petitioners since the 1988 and 1989 demonstrations at issue here. Petitioners cannot and do not argue that changed circumstances have rendered the permanent injunction

protecting the New York clinics unnecessary. The conduct that prompted the issuance of the injunction in Terry I therefore remains an ongoing threat and the prospective sanctions retain their remedial purpose. Moreover, to permit Petitioners to evade the consequences of their past defiance of the District Court's orders would only serve to encourage future violations.[17]

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[17] Petitioners' suggestion that the District Court was required to conform the prospective contempt sanctions to New York State law, Petition at 25 n.14, is foreclosed by their failure to raise it in Terry I, see Commissioner v. Sunnen, 333 U.S. 591, 597 (1948) (res judicata bars issues that were raised or could have been raised), and is flatly contradicted by this Court's precedents. The Federal courts have inherent power to compel obedience to their judgments and orders. Spallone v. United States, 493 U.S. 265, 276 (1990). So long as a federal court employs its inherent power to control the parties' "conduct during the litigation," Chambers v. Nasco, Inc., 111 S. Ct. 2123, 2138 (1991), "the district court's inherent power . . . [cannot] be made subservient to any state policy without transgressing the boundaries" established in Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), and its progeny. Chambers, 111 S. Ct. at 2138. Here, the District Court employed contempt power for just such a purpose by imposing fines to coerce Petitioners to comply with the injunction. After Chambers, Petitioners' argument, so obviously destructive to the federal contempt power, borders on frivolous and certainly provides no basis to grant certiorari. Nor is this a case where the Court must decide whether "a federal remedy can be provided even in the absence of a similar state remedy," Stern v. South Chester Tube Co., 390 U.S. 606, 609 (1968) (citing Guffey v. Smith, 237 U.S. 101 (1915)), because the "remedy" N.O.W. obtained, an award of

Because this case is so factually distinct from Bagwell, there is no reason for this Court to grant certiorari to consider this case along with Bagwell or to hold the case pending a disposition in Bagwell. Accordingly, the petition should be denied.

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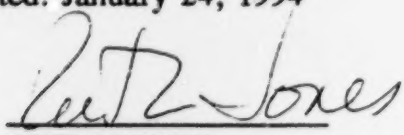
attorney's fees for bringing the contempt motion, is equally available under New York state law. See, e.g., 3855 B'way Laundromat, Inc. v. 600 W. 161st St. Corp., 156 A.D.2d 202, 548 N.Y.S.2d 461 (1st Dep't 1989).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Dated: January 24, 1994



RUTH JONES
(Counsel of Record)
DEBORAH A. ELLIS
NOW Legal Defense & Education Fund
99 Hudson Street
New York, New York 10013
(212) 925-6636

DAVID D. COLE
Center for Constitutional Rights
666 Broadway - 7th Floor
New York, New York 10012
(212) 614-6464

KIM J. LANDSMAN
JAMES M. BERGIN
EILEEN B. HERSHENOV
Morrison & Foerster
1290 Avenue of the Americas
New York, New York 10104
(212) 468-8000

APPENDICES

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

APPENDIX A

Respondents Complaint

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 8315/88

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN; NEW YORK CITY CHAPTER OF THE NATIONAL ORGANIZATION FOR WOMEN; NATIONAL ORGANIZATION FOR WOMEN; RELIGIOUS COALITION FOR ABORTION RIGHTS-NEW YORK METROPOLITAN AREA; NEW YORK STATE NATIONAL ABORTION RIGHTS ACTION LEAGUE, INC.; PLANNED PARENTHOOD OF NEW YORK CITY, INC.; EASTERN WOMEN'S CENTER, INC.; PLANNED PARENTHOOD CLINIC (BRONX); PLANNED PARENTHOOD CLINIC (BROOKLYN); PLANNED PARENTHOOD MARGARET SANGER CLINIC (MANHATTAN); OB-GYN PAVILION; THE CENTER FOR REPRODUCTIVE AND SEXUAL HEALTH; VIP MEDICAL ASSOCIATES; BILL BAIRD INSTITUTE (SUFFOLK); BILL BAIRD INSTITUTE (NASSAU); DR. THOMAS J. MULLIN; BILL BAIRD; REVEREND BEATRICE BLAIR; RABBI DENNIS MATH; REVEREND DONALD MORLAN; PRO-CHOICE COALITION,

Plaintiffs,

—against—

RANDALL TERRY; OPERATION RESCUE; REVEREND JAMES P. LISANTE; THOMAS HERLIHY; JOHN DOE(S) AND JANE DOE(S), the last two being fictitious names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein,

Defendants.

COMPLAINT

The plaintiffs, by their attorneys, Joan P. Gibbs, David Cole, and Rhonda Copelon, all associated with the Center for Constitutional Rights with offices at 666 Broadway, 7th Floor, New York, New York, 10012, and Sarah E. Burns and Alison Wetherfield of the Now Legal Defense & Education Fund, 99 Hudson Street, New York 10013, and 1333 H Street NW, 11th Floor, Washington, D.C., 20005, complain of the defendants and allege:

PRELIMINARY STATEMENT

1. This is an action for declaratory and injunctive relief addressed to impending actions directly threatening the health and safety of hundreds of women seeking abortions or other family planning services in clinics and other facilities in New York State during the week of April 30, 1988 to May 7, 1988. Plaintiffs, who include organizations representing the affected women and a class of clinics and abortion providers in New York City, Nassau, Suffolk, and Westchester Counties, seek a limited injunctive order ensuring that defendants' actions do not infringe plaintiffs' constitutional, statutory, and common law rights to obtain and provide abortions and other family planning and medical services and to enjoy protection from tortious interference with their exercise of these rights. Plaintiffs require immediate injunctive relief to forestall a meticulously planned series of tortious actions called "Operation Rescue" (hereinafter "the Operation") involving the blockade and harassment of family planning clinics and abortion providers within the City of New York, Nassau, Suffolk, and Westchester Counties, by defendant organizations and individuals, and others acting in concert with them or on their behalf.

2. Upon information and belief, defendants intend to block access to abortion providers, to obstruct the provision of abortion and other family planning services, and to intimi-

date, harass and restrain women attempting to use the services of the clinics. Defendants' actions are scheduled to take place in the City of New York and Nassau, Suffolk and Westchester Counties from April 30 to May 7, 1988, but defendants purposely have not indicated which providers they will specifically target in order to frustrate efforts to protect the affected facilities and patients. Defendants' actions will greatly increase the health risks faced by women seeking counseling, abortions, and other services in the targeted facilities, and therefore plaintiffs require immediate injunctive relief.

PARTIES

Plaintiffs

3. Plaintiff, the New York State National Organization for Women (hereinafter "NY NOW"), is a membership organization with 10,000 members with offices at 90 State Street, Albany, New York 12207, and at 151 W. 74th St., NY, New York 10023. It sues on behalf of itself and its members, who include women who will need to use abortion and family planning clinics in the City of New York and surrounding counties in the period from April 30 to May 7, 1988.

4. Plaintiff, the New York City Chapter of the National Organization for Women, is a membership organization with offices at 15 West 18th Street, New York, New York 10011. It sues on behalf of itself and its members, who include women who will need to use abortion and family planning facilities in the City of New York and surrounding counties in the period from April 30 to May 7, 1988.

5. Plaintiff, the National Organization for Women, is a membership organization with 160,000 members with offices at 1401 New York Avenue, N.W., Washington, DC 20005. It sues on behalf of itself and its members, who include women who will need to use abortion and family planning clinics in the City of New York and surrounding counties in the period from April 30 to May 7, 1988.

6. Plaintiff, the Religious Coalition for Abortion Rights-New York Metropolitan Area (hereinafter "RCAR") is a coalition of organizations and individuals with offices at 198 Broadway, Room 805, New York, New York 10038. It sues on behalf of itself and its members, who include women with various religious beliefs who support the right to choose abortions and who will need to use abortion and family planning clinics in the City of New York and surrounding counties in the period from April 30 to May 7, 1988.

7. Plaintiff, New York National Abortion Rights Action League, Inc. is a membership organization with offices at 2 West 64th Street, New York, New York 10023. It sues on behalf of itself and its members, who include women who will need to use abortion and family planning facilities in the City of New York and surrounding counties in the period from April 30 to May 7, 1988.

8. Plaintiff, Planned Parenthood of New York City, Inc., is a membership organization with offices at 276 5th Avenue, Suite 808, New York, New York 10011. It sues on behalf of itself and its members, who include women who will need to use abortion and family planning facilities in the City of New York and surrounding counties from April 30 to May 7, 1988.

9. Plaintiff, Eastern Women's Center, Inc., is a health care facility that provides abortions and other family planning services, located in New York County. It sues on behalf of itself, its staff, and its patients.

10. Plaintiff, Planned Parenthood Clinic (Bronx), is a health care facility that provides abortions and other family planning services, located in Bronx County. It sues on behalf of itself, its staff, and its patients.

11. Plaintiff, Planned Parenthood Clinic (Brooklyn), is a health care facility that provides abortions and other family planning services, located in Kings County. It sues on behalf of itself, its staff, and its patients.

12. Plaintiff, Planned Parenthood Margaret Sanger Clinic (Manhattan), is a health care facility that provides abortions and other family planning services, located in New York County. It sues on behalf of itself, its staff, and its patients.

13. Plaintiff, Ob-Gyn Pavilion, is a health care facility that provides abortions and other family planning services, located in Kings County. It sues on behalf of itself, its staff, and its patients.

14. Plaintiff, The Center for Reproductive and Sexual Health (CRASH), is a health care facility that provides abortions and other family planning services, located in New York County. It sues on behalf of itself, its staff, and its patients.

15. Plaintiff, VIP Medical Associates, is a health care facility that provides abortions and other family planning services, located in New York County. It sues on behalf of itself, its staff, and its patients.

16. Plaintiff, Bill Baird Institute (Suffolk) is a health care facility that provides abortions and other family planning services, located in Suffolk County. It sues on behalf of itself, its staff, and its patients.

17. Plaintiff, Bill Baird Institute (Nassau) is a health care facility that provides abortions and other family planning services, located in Nassau County. It sues on behalf of itself, its staff, and its patients.

18. Plaintiff, Bill Baird, is director of the Bill Baird Institutes in Nassau and Suffolk counties. He sues on behalf of himself, his staff, and his patients.

19. Plaintiff, Thomas J. Mullin, M.D., F.A.C.O.G., is the medical director of plaintiff Eastern Women's Center. He sues on behalf of himself, his staff and his patients.

20. Plaintiff, the Reverend Beatrice Blair, is a minister associated with Saint Marks Church In The Bowery, and the Chair of RCAR. Saint Marks Church In The Bowery is located at 131 East 10th Street, New York, New York.

21. Plaintiff, Rabbi Dennis Math, is the Vice-President of RCAR, and the Rabbi for the Village Temple, located at 33 East 12th Street, New York, New York.

22. Plaintiff, the Reverend Donald Morlan, is the Treasurer of RCAR, and is associated with the American Baptist Churches of Metropolitan New York with offices at 322 8th Avenue, New York, New York.

23. Plaintiff, the Pro-Choice Coalition, is a coalition of organizations and individuals dedicated to assuring the constitutional right of women to choose abortion. It sues on behalf of itself and its members who are required to devote their resources to providing protection for women needing to use the services of planning clinics and abortion providers in the face of defendants' planned blockade.

Class Allegations

24. Plaintiff family planning clinics and abortion providers sue on behalf of a class of all family planning clinics and abortion providers and their staff and patients in New York City, Nassau, Suffolk and Westchester Counties. The class is so numerous that joinder of all members is impracticable. Common questions of law and fact predominate over any questions affecting individual members of the class. The claims of the representative clinics and providers are typical of the claims of the class. The representative clinics and providers will fairly and adequately protect the interests of the class. A class action is superior to other available methods for a fair and efficient adjudication of this controversy.

Defendants

25. Upon information and belief, defendant Randall Terry, acting in concert with other defendants and others unknown, is the Executive Director of Project Life and the National Organizer of "Operation Rescue," and resides in Windsor, New York.

26. Upon information and belief, defendant "Operation Rescue" (hereinafter "the Operation") is a group of organi-

zations and individuals, with offices in Binghampton, New York. Its purpose is to organize and coordinate disruptions of abortion and family planning facilities, including the blockades scheduled from April 30 to May 7, 1988 in the New York City area. The Operation's literature lists its address as P.O. Box 1180, Binghampton, New York 13902, and its telephone number as (607) 723-4012.

27. Upon information and belief, defendant Reverend James P. Lisante, acting in concert with the other defendants and others unknown, is one of the organizers of the blockades scheduled for April 30 to May 7, 1988 in the New York City area. He is the Respect Life Coordinator for the Diocese of Rockville Centre, New York.

28. Upon information and belief, defendant Thomas Herlihy, acting in concert with other defendants and others unknown, is an officer of the Prolife Nonviolent Action Project, and a co-sponsor of the Operation. He resides in the Bronx, New York.

29. Defendants "John Doe(s)" and "Jane Doe(s)" are fictitious names, the real names of said defendants being presently unknown to plaintiffs. These fictitious names are intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein.

FACTS

30. The defendants, pursuant to a conspiracy that they have entitled "Operation Rescue," plan to obstruct and close down facilities at which abortions are performed in the New York City area from April 30 to May 7, 1988 by trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from such facilities, intimidating and harassing patients and visitors, staging disruptive protests, and otherwise disrupting and interfering with the operations of such facilities.

31. The defendants do not accept the decisions of the United States Supreme Court that the United States Constitution guarantees and protects a woman's right to choose abortion and to carry out that decision, and they intend to interfere with those rights of women attending the targeted clinics and providers.

32. Upon information and belief, defendants in carrying out the Operation will be joined by approximately 1000 people from various parts of the country.

33. Defendants' own published plans for the New York Operation state explicitly that they intend to "close down abortion mills" in the New York City area, and specifically to "prevent abortion mill employees or pregnant mothers from entering" the clinics. Defendants' instructions to their co-conspirators acknowledge that they are likely to be arrested, and state that even if the police make arrests and seek to "disperse the crowd, the goal you must have is to keep the doorway occupied."

34. Defendants have not publicly stated which clinics in New York City the Operation will target. Upon information and belief, defendants intend to keep this aspect of the New York Operation secret in order to frustrate attempts to protect and guarantee women's access to the clinics and providers. Plaintiff organizations intend to help protect and guarantee women's access to the facilities during the course of the Operation, but are frustrated in their attempts to do so by defendants' refusal to identify the targeted facilities.

35. Upon information and belief, upon their arrival in the City of New York, certain of the defendants will be staying at The Times Square Hotel at 255 West 43rd Street, New York, New York, and The Days Inn at 440 West 57th Street, New York, New York. Upon information and belief, others will be provided housing arranged by defendant Reverend James P. Lisante.

36. Plans for the New York Operation were first announced by defendant Randall Terry and certain other

defendants at a Pro-Life Action Network Conference in Atlanta, Georgia in May 1987. Ever since that time defendant Terry along with the other defendants have organized for this Operation, distributed fliers inviting others to participate, staged rallies and other organizing events, including "field training sessions," throughout the country.

37. On November 28, 1987, after an Operation "field training session" in Philadelphia, defendant Terry and certain other defendants conducted an all-day blockade of the Cherry Hill Women's Center in Cherry Hill, New Jersey. Upon information and belief, defendant Terry characterized this blockade as "a dry run for the first week in May . . . in New York City."

38. During the "dry run" in Cherry Hill, the doors to the Cherry Hill Women's Center were blocked by defendant Terry and other defendants for approximately nine and a half hours and over 200 people were arrested on trespass charges, which are still pending.

39. Participants in the trespass action at the Cherry Hill Women's Center, who came from various parts of the country, began gathering at the Cherry Hill Women's Center at approximately 6:00 a.m. and remained until 4:30 p.m., during which time they completely blocked all entrance to the Center, screamed and shouted at the women who had come to the Center for services, at the Center's staff, and at passersby, and damaged the front door and an outside speaker.

40. Thirty-eight women had appointments for abortions at the Cherry Hill Women's Clinic on November 28, 1987. As a result of the defendant Terry's and certain other defendants' activities, thirty-three of the women who had appointments for abortions that day could not be served. The other five women, who were in the middle of a two-day procedure, had to be treated by the Center's physician at an emergency alternative location.

41. On December 2, 1987, the Honorable Paul A. Lowengrub of the Superior Court of New Jersey, Chancery Divi-

sion, Camden County, entered an interlocutory injunction against defendants Randall Terry, the New York Central Pro-Life Federation and others, enjoining them from, *inter alia*, "invading or trespassing upon the property known as 502 North Kings Highway, Cherry Hill, New Jersey, also known as the Cherry Hill Women's Center, (2) from gathering, parading, patrolling or picketing the premises of the plaintiff Cherry Hill Women's Center in such a manner as to disrupt, intimidate or harass the executive staff, employees or patients of the Cherry Hill Women's Center and (3) from intentionally interfering with the flow of traffic into and out of the Cherry Hill Women's Center's premises by blocking or obstructing ingress into or egress from same . . ." *Cherry Hill Women's Center v. John Does 1 to 500*, Civ. A. No. C-03654-87 (Sup. Ct. N.J. Dec. 2, 1987) (interlocutory injunction).

42. Defendants intend to replicate the Cherry Hill blockade each day of the New York Operation, at various clinics and abortion providers' offices in New York City and the surrounding counties. The Operation is intended to have and will have the effect of denying or disrupting women's access to the targeted clinics with the intended result that many women will have to delay their scheduled services. Any delay in the provision of health services relating to childbirth and abortion significantly increases the health risks faced by the women affected. Therefore, unless defendants' planned activities are enjoined, substantial and irreparable damage will be done to women patients' health and safety, and to their rights to choose an abortion and to carry out that decision, as well as to the plaintiff clinics' rights to conduct their business.

43. Plaintiffs have no adequate remedy at law.

AS AND FOR A FIRST CAUSE OF ACTION

44. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

45. The actions planned by defendants, which are directed at women seeking abortions and other family planning services at the targeted facilities, jointly and individually, violate the laws of New York City and New York State, including New York Civil Rights Law, Section 40(c), and New York Executive Law Section 296.

AS AND FOR A SECOND CAUSE OF ACTION

46. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

47. The actions planned by defendants, jointly and individually, constitute a public nuisance designed to, and having the effect of, endangering the public security, safety and welfare of the City of New York, and its residents, especially those women seeking to obtain abortions or other family planning or medical services at facilities where abortions are performed.

AS AND FOR A THIRD CAUSE OF ACTION

48. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

49. The actions planned by defendants, jointly and individually, constitute a tortious interference with plaintiff facilities' business.

AS AND FOR A FOURTH CAUSE OF ACTION

50. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

51. The actions planned by defendants, jointly and individually, constitute a tortious intentional trespass on the targeted clinics and abortion providers.

AS AND FOR A FIFTH CAUSE OF ACTION

52. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

53. The actions of defendants, jointly and individually, constitute tortious intentional infliction of emotional harm on patients and employees of the plaintiff clinics and abortion providers.

AS AND FOR A SIXTH CAUSE OF ACTION

54. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

55. The actions planned by defendants, jointly and individually, constitute tortious harassment of patients and employees of the plaintiff clinics and abortion providers.

AS AND FOR A SEVENTH CAUSE OF ACTION

56. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

57. The actions planned by defendants, jointly and individually, constitute false imprisonment of patients and employees of the plaintiff clinics and providers.

AS AND FOR AN EIGHTH CAUSE OF ACTION

58. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

59. Defendants conspired together with each other and other parties presently unknown for the purpose of denying women seeking abortions and other family planning services at targeted facilities the equal protection of the laws and the equal privileges and immunities under the law and obstructing travel, in violation of 42 U.S.C. § 1985(3). Defendants are and continue to be motivated by an invidiously discrimi-

natory animus directed at the class of women seeking to exercise their constitutional and legal right to choose abortions and other family planning services at the targeted facilities, as well as at all facilities in the New York City area.

WHEREFORE, plaintiffs demand judgment, together with costs, fees and disbursements of this action as follows:

1. Declaring that the planned actions of defendants are violative of plaintiffs' rights to obtain and provide abortions under the United States Constitution and the statutes and common law of New York; and

2. Granting plaintiffs a preliminary and permanent injunction restraining and enjoining the defendants, the officers, directors, agents, and representatives of defendants, and all other persons whomsoever, known or unknown, acting in their behalf or in concert with them, in any manner or by any means from:

(a) trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester Counties, including demonstrating within 15 feet of any persons seeking access to or leaving those facilities, from April 30, 1988 to May 7, 1988, or the conclusion of a planned blockade called "Operation Rescue," whichever is later;

(b) physically abusing or tortiously harassing persons entering or leaving, working at or using any services at any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester Counties, from April 30, 1988 to May 7, 1988, or the conclusion of blockade activities, whichever is later;

(c) making any excessively loud sound which disturbs, injures, or endangers the health or safety of any patient or employee of the clinics;

(d) attempting or directing others to take any of the actions described in paragraphs (a), (b), and (c) above; and

(3) providing that nothing in the Court's Order should be construed to limit defendants' exercise of their legitimate First Amendment rights; and

(4) directing the defendant organizations and their officers, and the defendant individuals and those working in concert with them, to instruct all members of the organizations and conspiracy believed to be planning to participate in the activities enumerated above not to engage or participate in any such activities enjoined in paragraphs (a) through (d) above; and

(5) granting such other and further relief as the Court deems just and proper.

Respectfully submitted,

/s/ JOAN P. GIBBS
Joan P. Gibbs
Rhonda Copelon
David Cole*
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6464

/s/ ALISON WETHERFIELD
Alison Wetherfield
NOW Legal Defense & Education Fund
99 Hudson Street
New York, New York 10013
(212) 925-6635

Sarah E. Burns
NOW Legal Defense & Education Fund
1333 "H" St. NW
Washington, DC 20005
(202) 682-0940

Attorneys for Plaintiffs

Dated: New York, New York
April 25, 1988

* Admitted to practice in Pennsylvania.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN; NEW YORK CITY CHAPTER OF THE NATIONAL ORGANIZATION FOR WOMEN, NATIONAL ORGANIZATION FOR WOMEN; RELIGIOUS COALITION FOR ABORTION RIGHTS-NEW YORK METROPOLITAN AREA; NEW YORK STATE NATIONAL ABORTION RIGHTS ACTION LEAGUE, INC.; PLANNED PARENTHOOD OF NEW YORK CITY, INC.; EASTERN WOMEN'S CENTER, INC.; PLANNED PARENTHOOD CLINIC (BRONX); PLANNED PARENTHOOD CLINIC (BROOKLYN); PLANNED PARENTHOOD MARGARET SANGER CLINIC (MANHATTAN); OB-GYN PAVILION; THE CENTER FOR REPRODUCTIVE AND SEXUAL HEALTH; VIP MEDICAL ASSOCIATES; BILL BAIRD INSTITUTE (NASSAU); DR. THOMAS J. MULLIN; BILL BAIRD; REVEREND BEATRICE BLAIR; RABBI DENNIS MATH; REVERENT DONALD MORLAN; PRO-CHOICE COALITION

Plaintiffs,

Index No.
88 Civ. 3071 (RJW)

-against-

AMENDED COMPLAINT

RANDALL TERRY, individually and as president of OPERATION RESCUE, an uncorporated association, REVEREND JAMES P. LISANTE; THOMAS HERLIHY; JOHN DOE(S) AND JANE DOE(S), the last two being fictitious names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein,

Defendants.

----------x

The plaintiffs, by their attorneys, Joan P. Gibbs, David Cole, and Rhonda Copelon, all associated with the Center for [2] Constitutional Rights with offices at 666 Broadway, 7th Floor, New York, New York 10012, and Sarah E. Burns and Alison Wetherfield of the NOW Legal Defense & Education Fund, 99 Hudson Street, New York 10013, and 1333 H Street NW, 11th Floor, Washington, D.C., 20005, complain of the defendants and allege:

PRELIMINARY STATEMENT

1. This is an action for declaratory and injunctive relief addressed to impending actions directly threatening the health and safety of hundreds of women seeking abortions or other family planning services in clinics and other facilities in New York State during the week of April 30, 1988 to May 7, 1988. Plaintiffs, who include organizations representing the affected women and a class of clinics and abortion providers in New York City, Nassau, Suffolk, and Westchester Counties, seek a limited injunctive order ensuring that defendants' actions do not infringe plaintiffs' constitutional, statutory, and common law rights to obtain and provide abortions and other family planning and medical services and to enjoy protection from tortious interference with their exercise of these rights. Plaintiffs require immediate injunctive relief to forestall a meticulously planned series of tortious actions called "Operation Rescue" (hereinafter "the Operation") involving the blockade and harassment of family planning clinics and abortion providers within the City of New York, Nassau, Suffolk, and Westchester Counties, by defendant organizations and individuals, and others acting in concert with them or on their behalf. [3]

2. Upon information and belief, defendants intend to block access to abortion providers, to obstruct the provision

of abortion and other family planning services, and to intimidate, harass and restrain women attempting to use the services of the clinics. Defendants' actions are scheduled to take place in the City of New York and Nassau, Suffolk and Westchester Counties from April 30 to May 7, 1988, but defendants purposely have not indicated which providers they will specifically target in order to frustrate efforts to protect the affected facilities and patients. Defendants' actions will greatly increase the health risks faced by women seeking counseling, abortions, and other services in the targeted facilities, and therefore plaintiffs require immediate injunctive relief.

PARTIES

Plaintiffs

3. Plaintiff, the New York State National Organization for Women (hereinafter "NY NOW"), is a membership organization with 10,000 members with offices at 90 State Street, Albany, New York 12207, and at 151 W. 74th St., NY, New York 10023. It sues on behalf of itself and its members, who include women who will need to use abortion and family planning clinics in the City of New York and surrounding counties in the period from April 30 to May 7, 1988.

4. Plaintiff, the New York City Chapter of the National Organization for Women, is a membership organization with offices at [4] 15 West 18th Street, New York, New York 10011. It sues on behalf of itself and its members, who include women who will need to use abortion and family planning facilities in the City of New York and surrounding counties in the period from April 30 to May 7, 1988.

5. Plaintiff, the National Organization for Women, is a membership organization with 160,000 members with offices at 1401 New York Avenue, N.W., Washington, DC 20005. It sues on behalf of itself and its members, who include women who will need to use abortion and family planning clinics in the City of New York and surrounding counties in the period from April 30 to May 7, 1988.

6. Plaintiff, the Religious Coalition for Abortion Rights - New York Metropolitan Area (hereinafter "RCAR") is a coalition of organizations and individuals with offices at 198 Broadway, Room 805, New York, New York 10038. It sues on behalf of itself and its members, who include women with various religious beliefs who support the right to choose abortions and who will need to use abortion and family planning clinics in the City of New York and surrounding counties in the period from April 30 to May 7, 1988.

7. Plaintiff, New York State National Abortion Rights Action League, Inc. is a membership organization with offices at 2 West 64th Street, New York, New York 10023. It sues on behalf of itself and its members, who include women who will need to use abortion and family planning facilities in the City of New York and surrounding counties in the period from April 30, to May 7, 1988.

8. Plaintiff, Planned Parenthood of New York City, Inc., is a [5] membership organization with offices at 276 5th Avenue, Suite 808, New York, New York 10011. It sues on behalf of itself and its members, who include women who will need to use abortion and family planning facilities in the City of New York and surrounding counties from April 30 to May 7, 1988.

9. Plaintiff, Eastern Women's Center, Inc., is a

health care facility that provides abortions and other family planning services, located in New York County. It sues on behalf of itself, its staff, and its patients.

10. Plaintiff, Planned Parenthood Clinic (Bronx), is a health care facility that provides abortions and other family planning services, located in Bronx County. It sues on behalf of itself, its staff, and its patients.

11. Plaintiff, Planned Parenthood Clinic (Brooklyn), is a health care facility that provides abortions and other family planning services, located in Kings County. It sues on behalf of itself, its staff, and its patients.

12. Plaintiff, Planned Parenthood Margaret Sanger Clinic (Manhattan), is a health care facility that provides abortions and other family planning services, located in New York County. It sues on behalf of itself, its staff, and its patients.

13. Plaintiff, Ob-Gyn Pavilion, is a health care facility that provides abortions and other family planning services, located in Kings County. It sues on behalf of itself, its staff, and its patients.

14. Plaintiff, The Center for Reproductive and Sexual Health [6] (CRASH), is a health care facility that provides abortions and other family planning services, located in New York County. It sues on behalf of itself, its staff, and its patients.

15. Plaintiff, VIP Medical Associates, is a health care facility that provides abortions and other family planning services, located in New York County. It sues on behalf of itself, its staff, and its patients.

16. Plaintiff, Bill Baird Institute (Suffolk) is a health care facility that provides abortions and other family planning services, located in Suffolk County. It sues on behalf of itself, its staff, and its patients.

17. Plaintiff, Bill Baird Institute (Nassau) is a health care facility that provides abortions and other family planning services, located in Nassau County. It sues on behalf of itself, its staff, and its patients.

18. Plaintiff, Bill Baird, is director of the Bill Baird Institutes in Nassau and Suffolk counties. He sues on behalf of himself, his staff, and his patients.

19. Plaintiff, Thomas J. Mullin, M.D., F.A.C.O.G., is the medical director of plaintiff Eastern Women's Center. He sues on behalf of himself, his staff and his patients.

20. Plaintiff, the Reverend Beatrice Blair, is a minister associated with Saint Marks Church In The Bowery, and the Chair of RCAR. Saint Marks Church In The Bowery is located at 131 East 10th Street, New York, New York.

21. Plaintiff, Rabbi Dennis Math, is the Vice-President of [7] RCAR, and the Rabbi for the Village Temple, located at 33 East 12th Street, New York, New York.

22. Plaintiff, the Reverend Donald Morlan, is the Treasurer of RCAR, and is associated with the American Baptist Churches of Metropolitan New York with offices at 322 8th Avenue, New York, New York.

23. Plaintiff, the Pro-Choice Coalition, is a coalition of organizations and individuals dedicated to assuring the constitutional right of women to choose abortion. It sues on behalf of itself and its members who are required to

devote their resources to providing protection for women needing to use the services of planning clinics and abortion providers in the face of defendants' planned blockade.

Class Allegations

24. Plaintiff family planning clinics and abortion providers sue on behalf of a class of all family planning clinics and abortion providers and their staff and patients in New York City, Nassau, Suffolk and Westchester Counties. The class is so numerous that joinder of all members is impracticable. Common questions of law and fact predominate over any questions affecting individual members of the class. The claims of the representative clinics and providers are typical of the claims of the class. The representative clinics and providers will fairly and adequately protect the interests of the class. A class action is superior to other available methods for a fair and efficient adjudication of this controversy.

[8] Defendants

25. Upon information and belief, defendant Randall Terry, acting in concert with other defendants and others unknown, is the Executive Director of Project Life and the National Organizer of "Operation Rescue," and resides in Windsor, New York. Defendant Terry is sued in his individual capacity and in his representative capacity as president of "Operation Rescue", an unincorporated association.

26. Upon information and belief, defendant "Operation Rescue" (hereinafter "the Operation") is an unincorporated association, with offices in Binghamton, New York, whose members' purpose is to organize and coordinate disruptions of abortion and family planning facilities, including the

blockades scheduled from April 30 to May 7, 1988 in the New York City area. The Operation's literature lists its address as P.O. Box 1180, Binghamton, New York 13902, and its telephone number as (607) 723-4012.

27. Upon information and belief, defendant Reverend James P. Lisante, acting in concert with the other defendants and others unknown, is one of the organizers of the blockages scheduled for April 30 to May 7, 1988 in the New York City area. He is the Respect Life Coordinator for the Diocese of Rockville Center, New York.

28. Upon information and belief, defendant Thomas Herlihy, acting in concert with other defendants and others unknown, is an office of the Prolife Nonviolent Action Project, and a co-sponsor of the Operation. He resides in the Bronx, New York.

29. Defendants "John Doe(s)" and "Jane Doe(s)" are fictitious names, the real names of said defendants being presently unknown to plaintiffs. These fictitious names are **[9]** intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein.

FACTS

30. The defendants, pursuant to a conspiracy that they have entitled "operation Rescue," plan to obstruct and close down facilities at which abortions are performed in the New York City area from April 30 to May 7, 1988 by trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from such facilities, intimidating and harassing patients and visitors, staging disruptive protests, and otherwise disrupting and interfering with the operations

of such facilities.

31. The defendants do not accept the decisions of the United States Supreme Court that the United States Constitution guarantees and protects a woman's right to choose abortion and to carry out that decision, and they intend to interfere with those rights of women attending the targeted clinics and providers.

32. Upon information and belief, defendants in carrying out the Operation will be joined by approximately 1000 people from various parts of the country.

33. Defendants' own published plans for the New York Operation state explicitly that they intend to "close down abortion mills" in the New York City area, and specifically to "prevent abortion mill employees or pregnant mothers from entering" the clinics. Defendants' instructions to their co- **[10]** conspirators acknowledge that they are likely to be arrested, and state that even if the police make arrests and seek to "disperse the crowd, the goal you must have is to keep the doorway occupied."

34. Defendants have not publicly stated which clinics in New York City the Operation will target. Upon information and belief, defendants intend to keep this aspect of the New York Operation secret in order to frustrate attempts to protect and guarantee women's access to the clinics and providers. Plaintiff organizations intend to help protect and guarantee women's access to the facilities during the course of the Operation, but are frustrated in their attempts to do so by defendants' refusal to identify the targeted facilities.

35. Upon information and belief, upon their arrival in the City of New York, certain of the defendants will be

staying at The Times Square Hotel at 255 West 43rd Street, New York, New York, and The Days Inn at 440 West 57th Street, New York, New York. Upon information and belief, others will be provided housing arranged by defendant Reverend James P. Lisante.

36. Plans for the New York Operation were first announced by defendant Randall Terry and certain other defendants at a Pro-Life Action Network Conference in Atlanta, Georgia in May 1987. Ever since that time defendant Terry along with the other defendants have organized for this Operation, distributed fliers inviting others to participate, staged rallies and other organizing events, including "field training sessions," throughout [11] the country.

37. On November 28, 1987, after an Operation "field training session" in Philadelphia, defendant Terry and certain other defendants conducted an all-day blockade of the Cherry Hill Women's Center in Cherry Hill, New Jersey. Upon information and belief, defendant Terry characterized this blockade as "a dry run for the first week in May. . . in New York City."

38. During the "dry run" in Cherry Hill, the doors to the Cherry Hill Women's Center were blocked by defendant Terry and other defendants for approximately nine and a half hours and over 200 people were arrested on trespass charges, which are still pending.

39. Participants in the trespass action at the Cherry Hill Women's Center, who came from various parts of the country, began gathering at the Cherry Hill Women's Center at approximately 6:00 a.m. and remained until 4:30 p.m., during which time they completely blocked all entrance to the Center, screamed and shouted at the women

who had come to the Center for services, at the Center's staff, and at passersby, and damaged the front door and an outside speaker.

40. Thirty-eight women had appointments for abortions at the Cherry Hill Women's Clinic on November 28, 1987. As a result of the defendant Terry's and certain other defendants' activities, thirty-three of the women who had appointments for abortions that day could not be served. The other five women, who were in the middle of a two-day procedure, had to be treated by the Center's physician [12] at an emergency alternative location.

41. On December 2, 1987, the Honorable Paul A. Lowengrub of the Superior Court of New Jersey, Chancery Division, Camden County, entered an interlocutory injunction against defendants Randall Terry, the New York Center Pro-Life Federation and others, enjoining them from, inter alia, "invading or trespassing upon the property known as 502 North Kings Highway, Cherry Hill, New Jersey, also known as the Cherry Hill Women's Center, (2) from gathering, parading, patrolling or picketing the premises of the plaintiff Cherry Hill Women's Center in such a manner as to disrupt, intimidate or harass the executive staff, employees or patients of the Cherry Hill Women's Center and (3) from intentionally interfering with the flow of traffic into and out of the Cherry Hill Women's Center's premises by blocking or obstructing ingress into or egress from same..." Cherry Hill Women's Center v. John Does 1 to 500, Civ. A. No. C-03654-87 (Sup. Ct. N.J. Dec. 2, 1987)(interlocutory injunction).

42. Defendants intend to replicate the Cherry Hill blockade each day of the New York Operation, at various clinics and abortion providers' offices in New York City and the surrounding counties. The Operation is intended to

have and will have the effect of denying or disrupting women's access to the targeted clinics, with the intended result that many women will have to delay their scheduled services. Any delay in the provision of health services relating to childbirth and abortion significantly increases the health risks faced by the women affected. **[13]** Therefore, unless defendants' planned activities are enjoined, substantial and irreparable damage will be done to women patients' health and safety, and to their rights to choose an abortion and to carry out that decision, as well as to the plaintiff clinics' rights to conduct their business.

43. Plaintiffs have no adequate remedy at law.

AS AND FOR A FIRST CAUSE OF ACTION

44. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

45. The actions planned by defendants, which are directed at women seeking abortions and other family planning services at the targeted facilities, jointly and individually, violate the laws of New York City and New York State, including New York Civil Rights Law, Section 40(c), and New York Executive Law Section 296.

AS AND FOR A SECOND CAUSE OF ACTION

46. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

47. The actions planned by defendants, jointly and individually, constitute a public nuisance designed to, and having the effect of, endangering the public security, safety

and welfare of the City of New York, and its residents, especially those women seeking to obtain abortions or other family planning or medical services at facilities where abortions are performed.

AS AND FOR A THIRD CAUSE OF ACTION

[14] 48. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

49. The actions planned by defendants, jointly and individually, constitute a tortious interference with plaintiff facilities' business.

AS AND FOR A FOURTH CAUSE OF ACTION

50. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

51. The actions planned by defendants, jointly and individually, constitute a tortious intentional trespass on the targeted clinics and abortion providers.

AS AND FOR A FIFTH CAUSE OF ACTION

52. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

53. The actions of defendants, jointly and individually, constitute tortious intentional infliction of emotional harm on patients and employees of the plaintiff clinics and abortion providers.

AS AND FOR A SIXTH CAUSE OF ACTION

54. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

55. The actions planned by defendants, jointly and individually, constitute tortious harassment of patients and employees of the plaintiff clinics and abortion providers.

AS AND FOR A SEVENTH CAUSE OF ACTION

[15] 56. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

57. The actions planned by defendants, jointly and individually, constitute false imprisonment of patients and employees of the plaintiff clinics and providers.

AS AND FOR AN EIGHTH CAUSE OF ACTION

58. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 43 as if fully set forth herein.

59. Defendants conspired together with each other and other parties presently unknown for the purpose of denying women seeking abortions and other family planning services at targeted facilities the equal protection of the laws and the equal privileges and immunities under the law and obstructing travel, in violation of 42 U.S.C. § 1985(3). Defendants are and continue to be motivated by an invidiously discriminatory animus directed at the class of women seeking to exercise their constitutional and legal right to choose abortions and other family planning services

at the targeted facilities, as well as at all facilities in the New York area.

WHEREFORE, plaintiffs demand judgment, together with costs, fees and disbursements of this actions as follows:

1. Declaring that the planned actions of defendants are violative of plaintiffs' rights to obtain and provide abortions under the United States Constitution and the statutes and common law of New York; and

[16] 2. Granting plaintiffs a preliminary and permanent injunction restraining and enjoining the defendants, the officers, directors, agents, and representatives of defendants, and all other persons whomsoever, known or unknown, acting in their behalf or in concert with them, in any manner or by any means from:

a) trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester Counties, including demonstrating within 15 feet of any persons seeking access to or leaving those facilities, from April 30, 1988 to May 7, 1988, or the conclusion of a planned blockade called "Operation Rescue," whichever is later;

(b) physically abusing or tortiously harassing persons entering or leaving, working at or using any services at any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester

Counties, from April 30, 1988 to May 7, 1988, or the conclusion of blockade activities, whichever is later;

c) making any excessively loud sound which disturbs, injures, or endangers the health or safety of any patient or employee of the clinics;

d) attempting or directing others to take any of [17] the actions described in paragraphs (a), (b), and (c) above; and

3. providing that nothing in the Court's Order should be construed to limit defendant's exercise of their legislative First Amendment rights, and

4. Directing the defendant organizations and their officers, and the defendant individuals and those working in concert with them, to instruct all members of the organizations and conspiracy believed to be planning to participate in the activities enjoined in paragraphs (a) through (d) above; and

5. Granting such other and further relief as the Court deems just and proper.

Respectfully submitted,

Joan P. Gibbs
Rhonda Copelon
David Cole*
Center for Constitutional Rights
666 Broadway - 7th Floor
New York, New York 10012
(212) 614-6464

Alison Wetherfield
NOW Legal Defense & Education Fund
99 Hudson Street
New York, New York 10013
(212) 925-6635

Sarah E. Burns**
NOW Legal Defense and Education Fund
1333 "H" Street NW
Washington, DC 20005
(202) 682-0940

Attorneys for Plaintiffs

Dated: New York, New York
August 15, 1988

* Admitted to practice in Pennsylvania
** Admitted to practice in Washington, D.C.

APPENDIX C

No. 89-1408

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RANDALL TERRY, OPERATION RESCUE, REV. JAMES P. LISANTE, THOMAS HERLIHY, JOHN DOES AND JANE DOES,

Petitioners,

—v.—

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN, *et al.*,

Respondents,

CITY OF NEW YORK,

Respondent-Intervenor,

UNITED STATES OF AMERICA,

Respondent-Judgment Creditor.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MICHAEL P. TIERNEY
80 Pine Street
New York, New York 10005
(212) 701-3524

A. LAWRENCE WASHBURN, JR.
10 Brennan Place
Deer Park, New York 11729
(516) 243-6514

JOSEPH P. SECOLA*
GEORGE J. MERCER
LAWRENCE S. WALTERS, JR.
The Rutherford Institute of Connecticut
P.O. Box 3196
Milford, Connecticut 06460
(203) 355-0923

Attorneys for Petitioners

**Counsel of Record for Petitioners*

QUESTIONS PRESENTED

I. Whether the 42 U.S.C. 1985(3) requirement of class-based animus is satisfied by a class of women in general or a subclass of women abortion-seekers?

II. Whether brief non-violent sit-in demonstrations of a few hours occurring on public sidewalks in front of facilities in which abortions are performed violate the interstate Right to Travel of the plaintiffs or the purported individual women they were allowed to represent?

III. Whether the contempt fines of $50,000 (originally payable to plaintiff National Organization for Women, modified by the circuit court to be payable to the United States) and $19,141 (payable to the City of New York for police overtime), imposed on motion papers without a hearing, against defendants Randall Terry and Operation Rescue for engaging in two days of public demonstrations at two separate locations, were criminal in nature requiring due process protections for the defendants?

IV. Whether there existed genuine disputes of substantial material facts so as to preclude the district court from granting summary judgment under the doctrine of *Anderson* v. *Liberty Lobby*, 477 U.S. 242 (1986)?

V. Whether public demonstrations containing elements of civil disobedience or individual acts of civil disobedience for political purposes may be treated in all respects as non-expressive conduct, deserving no First Amendment safeguards whatsoever?

VI. Whether the plaintiffs and plaintiff-intervenor lack Article III standing due to lack of a cognizable harm to any plaintiff?

VII. Whether the imposition of discovery sanctions against defendants and their *pro bono* counsel was an abuse of discretion in view of the constitutional privileges asserted?

PARTIES

In addition to the Petitioners and Respondents listed in the caption, the following are also Respondents in this action: New York City Chapter of the National Organization for Women; National Organization for Women; Religious Coalition for Abortion Rights-New York Metropolitan Area; New York State National Abortion Rights Action League, Inc.; Planned Parenthood of New York City, Inc.; Eastern Women's Center, Inc.; Planned Parenthood Clinic (Bronx); Planned Parenthood Clinic (Brooklyn); Planned Parenthood Margaret Sanger Clinic (Manhattan); Ob-Gyn Pavilion; The Center for Reproductive and Sexual Health; VIP Medical Associates; Bill Baird Institute (Suffolk); Bill Baird Institute (Nassau); Dr. Thomas J. Mullin; Bill Baird; Reverend Beatrice Blair; Rabbi Dennis Math; Reverend Donald Morlan; Pro Choice Coalition.

The United States of America was added as a party as a result of the court of appeals judgment below. Petitioner OPERATION RESCUE is not a corporation under Rule 28.1 of the Rules of this Court.

TABLE OF CONTENTS

	PAGE
Table of Authorities	v
Opinions Below	2
Jurisdiction	2
Statutory Provisions	2
Statement of the Case	2
REASONS FOR GRANTING THE WRIT	5
I. The Second Circuit Erroneously Held That Subgroupings of Gender-Based Animus Come Within the Purview of § 1985(3)	5
II. The Second Circuit Erroneously Held That Brief Non-Violent Sit-In Demonstrations on Public Sidewalks Implicate the Right to Travel	11
III. The Second Circuit Erroneously Held That The Contempt Fines Imposed by the District Court Were Civil In Nature	13
IV. The Petitioners Have Been Denied A Fair Trial on Constitutional Issues	16
V. Petitioners' First Amendment Rights Have Been Violated By Court Orders That Imposed Unlawful Prior Restraints of Protected Speech	19
VI. The Second Circuit Erred In Conferring Article III Standing on Respondents and Respondent-Intervenor	27
VII. The Second Circuit's Award of Costs Under Rule 37(a)(4) Jointly and Severally Against Defendants and Their Counsel Was Arbitrary and an Abuse of Discretion	28
Conclusion	30

PAGE

Colombrito v. *Kelly*, 764 F.2d 122 (2d Cir. 1985) 6n

Commonwealth of Pa. ex. rel. Rafferty v. *Philadelphia Psychiatric Ctr.*, 356 F.Supp. 500 (E.D. Pa. 1973) . 27n

Conklin v. *Lovely*, 834 F.2d 543 (6th Cir. 1987) 7n

Conroy v. *Conroy*, 575 F.2d 175 (8th Cir. 1978)..... 7n

Cousins v. *Terry*, 721 F.Supp. 426 (N.D.N.Y. 1989).. 6n

Cox v. *Louisiana*, 379 U.S. 536 (1965)..... 20

Crawford v. *American Federation of Government Employees*, 576 F.Supp. 812 (D.D.C. 1983)..... 29n

Crozer-Chester Medical Ctr. v. *Moran*, 560 A.2d 133 (Pa. 1989)..... 16n

Daigle v. *Gulf Utilities Co., Local 2286*, 794 F.2d 974 (5th Cir. 1986)..... 7n

Damato v. *Wisconsin Gas Co.*, 760 F.2d 1474 (7th Cir. 1985)..... 7n

Doe v. *Bolton*, 410 U.S. 179 (1973)..... 11

Dole Fresh Fruit Co. v. *United Banana Co.*, F.2d 106 (2d Cir. 1987).....22, 23n, 27

Donohue v. *Windsor Locks Bd. of Fire Com'rs*, 834 F.2d 54 (2d Cir. 1987) 17n, 18n

Douglas v. *First National Realty Corp.*, 543 F.2d 894 (D.C. Cir. 1971) 16n

Dunn v. *Blumstein*, 405 U.S. 330 (1974) 12n

Edwards v. *South Carolina*, 372 U.S. 229 (1963)..... 20

Eitel v. *Holland*, 787 F.2d 995 (5th Cir. 1986)..... 7n

Erznoznik v. *Jacksonville*, 422 U.S. 205 (1975)..... 22n

Falstaff v. *Miller*, 702 F.2d 770 (9th Cir. 1983)..... 16n

PAGE

Finley v. *United States*, ____ U.S. ____, 109 S.Ct. 2003 (1989) 27

Garza v. *Marine Transport Lines, Inc.*, 871 F.2d 23 (2d Cir. 1985) 18n

Gibson v. *United States*, 781 F.2d 1334 (9th Cir. 1986) 8n

Gompers v. *Buck's Stove & Range*, 221 U.S. 418, 31 S.Ct. 492 (1911)..... 15

Griffin v. *Breckenridge*, 403 U.S. 88 (1971)....5n, 9n, 10n, 11, 12n

Grimes v. *Smith*, 776 F.2d 1359 (7th Cir. 1985)..... 7n

Hague v. *CIO*, 307 U.S. 496 (1939)..... 20

Harrison v. *KVAT Food Management, Inc.*, 766 F.2d 155 (4th Cir. 1985) 6n, 9

Hess v. *New Jersey Transit Rail Operations, Inc.*, 946 F.2d 114 (2d Cir. 1988)..... 16n

Hicks on Behalf of Feiock v. *Feiock*, 485 U.S. 624 (1988) 14, 14n, 15

Hobson v. *Wilson*, 737 F.2d 1 (D.C. Cir. 1984) 8n

Hulvat v. *Royal Indemnity Co.*, 277 F.Supp. 769 (E.D. Wis. 1967)..... 29n

Humphreys Exterminating Co. v. *Poulter*, 62 F.R.D. 392 (D. Md. 1974) 29n

In re Grand Jury Witness, 835 F.2d 437 (2d Cir. 1987), *cert. denied sub nom. Arambulo* v. *United States*, 485 U.S. 1039 (1988) 16n

PAGE

In re Stewart, 571 F.2d 958 (5th Cir. 1978)..... 16n

Judge v. *City of Buffalo*, 524 F.2d 1321 (2d Cir. 1975) 18n

Keating v. *Carey*, 706 F.2d 377 (2d Cir. 1983)..... 6n

Lopez v. *Arrowhead Ranches*, 523 F.2d 924 (9th Cir. 1975)..... 11n

Los Angeles v. *Lyons*, 461 U.S. 95 (1983)..... 27

Matsushita Electric Industrial Co. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) 18

McLean v. *Int'l Harvester Co.*, 817 F.2d 1214 (5th Cir. 1987)..... 7n

Mears v. *Town of Oxford, Md.*, 762 F.2d 368 (4th Cir. 1985)..... 6n

Memorial Hospital v. *Maricona County*, 415 U.S. 250 (1974) 12n

Metromedia, Inc. v. *City of San Diego*, 453 U.S. 490 (1981) 22n

Michaelson v. *United States*, 266 U.S. 42 (1924) 15n

Mississippi Women's Medical Clinic v. *McMillan*, 866 F.2d 788 (5th Cir. 1989).....7n, 11n

Motown Record Corp. v. *Mary Jane Girls, Inc.*, 118 F.R.D. 35 (S.D.N.Y. 1987)..... 17

N.A.A.C.P. v. *Button*, 371 U.S. 415 (1963) 25

National Abortion Federation v. *Operation Rescue*, 721 F.Supp. 1168 (C.D. Cal. 1989).....8n, 9-10, 9n, 10n

National Abortion Federation v. *Operation Rescue*, No. CV 89-1181, slip op. (C.D. Cal. January 31, 1990)..... 12n

PAGE

Portland Feminist Women's Health Center v. *Advocates for Life, Inc.*, 712 F.Supp. 165 (D.Ore. 1989) 8n

Prince Georges County, Md. v. *Levi*, 79 F.R.D. 1 (D. Md. 1977) 27n

Rayborn v. *Mississippi State Bd. of Dental Examiners*, 776 F.2d 530 (5th Cir. 1986) 7n

Reichard v. *Life Ins. Co.*, 591 F.2d 499 (9th Cir. 1979) 8n

Reygo Pacific Corp. v. *Johnston Pump Co.*, 680 F.2d 647 (9th Cir. 1982) 29n

Rizzo v. *Goode*, 423 U.S. 362 (1976) 27

Robinson v. *Cantebury Village*, 849 F.2d 424 (3d Cir. 1988)..... 6n

Roe v. *Abortion Abolition Society*, 811 F.2d 931 (5th Cir. 1987).....7n, 10n

Roe v. *Operation Rescue*, No. 88-5157, slip. op. (E.D. Pa., December 19, 1988)..... 27

Roe v. *Operation Rescue*, 710 F.Supp. 577 (E.D. Pa. 1989)..... 6n

Roe v. *Wade*, 410 U.S. 113 (1973)..... 3

Schultz v. *Sundberg*, 759 F.2d 714 (9th Cir. 1985) ... 8n

Shapiro v. *Thompson*, 394 U.S. 618 (1969)..... 12n

Shillitani v. *United States*, 384 U.S. 364 (1966) 15

Spallone v. *United States*, ____ U.S. ____, 58 U.S.L.W. 4103 (1990) 24

Spence v. *Washington*, 418 U.S. 405 (1974)..... 26

Spevack v. *Klein*, 385 U.S. 511 (1967) 30

Stillman v. *Edmund Scientific Co.*, 522 F.2d 798 (4th Cir. 1975) 29n

PAGE

Texas v. *Johnson*, 491 U.S. ____, 109 S.Ct. 2533 (1989) 26

Thornburgh v. *American Coll. of Obst. and Gyn.*, 476 U.S. 747 (1986) 4, 15, 16, 19

Trerice v. *Summons*, 755 F.2d 1081 (4th Cir. 1985) .. 6n

Union Tool v. *Wilson*, 259 U.S. 107 (1922) 14n

United Broth. of Carpenters and Joiners v. *Scott*, 463 U.S. 825 (1983) 5, 9, 9n, 12n

United States v. *Ayers*, 866 F.2d 571 (2d Cir. 1989).. 16n

United States v. *Edgerton*, 734 F.2d 913 (2d Cir. 1984) 25

United States v. *Grace*, 461 U.S. 171 (1983) 20

United States v. *Miller*, 540 F.2d 1213 (4th Cir. 1976) 16n

United States v. *North*, 621 F.2d 1255 (3d Cir. 1980) 16n

United States v. *O'Brien*, 391 U.S. 367 (1968) ...25, 26, 27

United States v. *Ruggiero*, 835 F.2d 443 (2d Cir. 1987) 22n

United States v. *Spectro Foods*, 544 F.2d 1175 (3d Cir. 1976) 16n

United States Catholic Conference v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988) 28

Volk v. *Koler*, 845 F.2d 1422 (7th Cir. 1988) 7n

Webster v. *Reproductive Health Services, et al.*, 492 U.S. ____, 106 L.Ed.2d 410 (1989) 4n, 11n

Weisberg v. *Webster*, 749 F.2d 864, 873-74 (D.C. Cir. 1984) 29

Widmar v. *Vincent*, 454 U.S. 263 (1981) 22n

Wilhelm v. *Continental Title Co.*, 720 F.2d 1173 (10th Cir. 1983) 8n, 9, 9n

PAGE

White Motor Company v. *United States*, 372 U.S. 253 (1963) 17

Young v. *U.S. Ex. Rel. Vuitton Et Fils S.A.*, 481 U.S. 787 (1987) 14

Statutes and Rules:

28 U.S.C. 1254(1) 2

42 U.S.C. Section 1983 ..... 17n

42 U.S.C. Section 1985(3) (1976 ed., Supp. V), The Klu Klux Klan Act of 1871 .....2, 4, 5, 5n

Fed.R.Civ.P. 37(a)(4).....28, 29

Supreme Court Rule 28.1 ..... 1n

1970 Advisory Committee Note to Rule 37(a)(4)..... 29n

Other Authorities:

4A J. Moore, *Federal Practice* ¶ 37,02 [10.-4] (2d ed. 1988)..... 29n

6(2) J. Moore, *Federal Practice* ¶ 56.17(10) (2d ed. 1988)..... 17

New Perspectives on Human Abortion, Part I, Sec. 2: E. Bleckschmidt, M.D., *Human Being from the Very First* (1981) 3n

Lambak, *Necessity and International Law: Arguments for the Legality of Civil Disobedience*, 5 Yale L. & Policy Rev. 472 (1987)..... 3n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RANDALL TERRY, OPERATION RESCUE, REV. JAMES P. LISANTE, THOMAS HERLIHY, JOHN DOES AND JANE DOES,
Petitioners,

—v.—

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN; *et al.*,
Respondents,

CITY OF NEW YORK,
Respondent-Intervenor,

UNITED STATES OF AMERICA,
Respondent-Judgment Creditor.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners Randall Terry, Operation Rescue,[1] Rev. James P. Lisante and Thomas Herlihy respectfully pray that a petition for a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

1 Operation Rescue is not a corporation under Rule 28.1 of the Rules of this Court. Its status as a separate entity was an issue in the courts below.

This case involves the validity of injunctions against anti-abortion demonstrations in the City of New York and its environs, which injunctions provide for a $25,000 fixed unconditional fine *against each individual* for its initial violation and a doubling of the fine for each successive violation, *i.e.*, $50,000, then $100,000, then $200,000, etc. Unconditional contempt fines imposed on motion papers without a hearing of $50,000 (originally payable to Respondent National Organization for Women, but modified by the panel to be payable to the United States) and $19,141 (to the City of New York for police overtime because of failure to give 12 hours advance notice of the exact location of the demonstration) have already been imposed against Petitioners Terry and Operation Rescue for violations.[2]

This case arises in the context of political action and public protests, including "Operation Rescue" blockades of abortion sites, as a result of the abortion of many millions of unborn children in the United States since 1973. Petitioners believe that human life is precious. The miracle of conception and growth of human life within a mother's womb has been scientifically observed, documented and described.[3] However, since *Roe* v. *Wade*, 410 U.S. 113 (1973), thousands of arrests and prosecutions for trespass and other state law violations have occurred nationwide. Hundreds have been arrested in the New York City area alone.

The United States experienced similar wrenching social upheaval and political division with the Civil Rights and Vietnam war protests of previous decades.[4] The evident and powerful result of deeply held beliefs by Americans has always been political protest and civil dissent. It is certain that abor-

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2 Subsequent to the affirmance by the Second Circuit, the United States became a party to this action as Judgment Creditor of the $50,000 contempt fine and has vigorously pursued collection of this judgment, seizing the Christmas payroll of Operation Rescue on December 22, 1989.

3 *New Perspectives on Human Abortion*, Part I, Sec. 2: E. Blechschmidt M.D., *Human Being from the Very First* (1981).

4 Lambak, *Necessity and International Law: Arguments for the Legality of Civil Disobedience*, 5 Yale L. & Pol'y Rev. 472, 480-81 (1987).

tion is the most divisive public issue of the last two decades,[5] perhaps the greatest national political and moral question since slavery.

In this case the district court granted summary judgment against the petitioners under the Ku Klux Klan Act, 42 U.S.C. Section 1985(3). The demonstrators were held to have had an invidiously discriminatory animus against a subclass of "women seeking abortions," violating their interstate Right to Travel, although it was evident that the demonstrations were aimed at the general public, and no evidence of any individual women whose interstate Right to Travel is claimed to have been violated was offered.

The following remarks of Justice O'Connor are appropriate as a prism through which the lower courts' decisions in this case may be viewed:

> Today's decision goes further, and makes it painfully clear that *no legal rule or doctrine is safe from ad hoc nullification by this Court, when an occasion for its application arises in a case involving* state regulation of *abortion.*
>
> • • •
>
> In so doing, the Court *prematurely decides serious constitutional questions on an inadequate record, in contravention of settled principles of constitutional adjudication and procedural fairness.* The constitutionality of the challenged provisions was not properly before this Court. There has been *no trial on the merits, and appellants have had no opportunity to develop facts that might have a bearing on the constitutionality* of the statute.
>
> • • •
>
> *Appellants should not have to prove that they are entitled to an opportunity to be heard.* (Emphasis added)

Thornburgh v. American Coll. of Obst. and Gyn., 476 U.S. 747, 814-816 (1986) (O'Connor, J., dissenting). Through numerous denials of Petitioners' requests for hearings, and a

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5 *Webster* v. *Reproductive Health Services, et al.*, 492 U.S. _____, 106 L. Ed.2d 410, 463 (1989) (Blackmun, J., dissenting and concurring in part).

misuse of the summary judgment procedure, the lower courts have repeatedly denied the Petitioners their entitled opportunity to be heard on constitutional issues of national import.

REASONS FOR GRANTING THE WRIT

I. The Second Circuit Erroneously Held That Subgroupings of Gender-Based Animus Come Within the Purview of § 1985(3)

By finding that a subgrouping of gender, "women seeking abortions," was a sufficient class for § 1985(3), the Second Circuit has rejected the caution expressed by this Court in *United Broth. of Carpenters and Joiners, Local 610* v. *Scott*, 463 U.S. 825, 835 (1983), where this Court specifically refused to affirm that § 1985(3) "reaches conspiracies other than those motivated by racial bias." If it does, then this Court should say so and why.

The central dispute of this appeal involves 42 U.S.C. Section 1985(3) (1976 ed., Supp. V), The Ku Klux Klan Act of 1871.[6] The subject matter is abortion. Intervention by this Court is critical at this time to clarify the boundaries of the meaning of "class of persons" and "invidiously discriminatory animus," in an manner that lower federal courts can not mistake. The strongly worded cautions of this Court in *United Brotherhood of Carpenters and Joiners, Local 610* v. *Scott, supra*, are now being completely ignored by circuit courts, most stridently by the Second Circuit in this case.

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6 A *prima facie* case for relief under 42 U.S.C. Section 1985(3) must consist of alleging at least four necessary elements:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the law; (3) an act of furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

United Board of Carpenters and Joiners, Local 610 v. *Scott, supra*, at 828-29 (1983) (restating the test first formulated in *Griffin* v. *Breckenridge*, 403 U.S. 88, 102-03 (1971)).

The chart below sets forth in graphic terms the broad nationwide circuit conflict and resulting confusion over the application of Section 1985(3).

CIRCUIT	CLASS BASED ANIMUS
First	No circuit cases reach this issue
Second	Extremely broad view that women in general constitute a class as well as a subgrouping of "women seeking abortions" and wide standard of animus;[7] Religion;[8] political affiliation[9]
Third	Intra-circuit conflict: open question on class,[10] Sex[11]
Fourth	Intra-Circuit Panel Conflict; Race only;[12] Race & Religion;[13] Race, National Origin & Sex.[14]

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7 *N.Y. State Nat. Organization for Women* v. *Terry*, *supra* (A-37 to 43). Expansive view that "animus merely describes a person's basic attitude or intention." (A-42) *Cousins* v. *Terry*, 721 F.Supp. 426 (N.D.N.Y. 1989) (women seeking abortions).

8 *Colombrito* v. *Kelley*, 764 F.2d 122, 130-131 (2nd Cir. 1985).

9 *Keating* v. *Carey*, 706 F.2d 377, 386-388 (2nd Cir. 1983).

10 *Robinson* v. *Cantebury Village*, 849 F.2d 424, 430, n.7 (3rd Cir. 1988) (but non-minority employee speech against racist employer practices is sufficient, citing prior case).

11 *Novotny* v. *Great American Federal Savings & Loan Ass'n*, 584 F.2d 1235, 1243-44 (3rd Cir. 1978) (*en banc*), *rev'd on other grounds*, 442 U.S. 366 (1979); *Roe* v. *Operation Rescue*, 710 F.Supp. 577, 581 (E.D. Pa. 1989) (following *Novotny*, "women seeking abortions" approved).

12 *Harrison* v. *KVAT Food Management Inc.*, 766 F.2d 155 (4th Cor. 1985) (in depth analysis of Congressional intent and *Scott*: race only); *Mears* v. *Town of Oxford, M.D.*, 762 F.2d 368 (4th Cir. 1985) (race only)

13 *Trerice* v. *Summons*, 755 F.2d 1081, 1085 (4th Cir. 1985).

14 *Bushi* v. *Kirven*, 775 F.2d 1240, 1257 (4th Cir. 1985); *NOW* v. *Operation Rescue*, Civil Action No. 89-1558-A, slip op., 1989 U.S. Dist. Lexis 14919 at 21-22 (D.Va. December 6, 1989) (following *Bushi*, "women seeking abortions" approved).

Fifth	Intra-Circuit Conflict: 1) Race only;[15] 2) Race & Religion;[16] 3) Race, National Origin, Sex & and political beliefs and associations;[17] 4) Rejected women of childbearing age seeking medical attention [abortions].[18]
Sixth	Racial and Political classes.[19]
Seventh	Intra-Circuit panel conflict: 1) Race only;[20] 2) Race, Sex, Religion, Ethnicity, and Political Loyalty.[21]
Eighth	Sex and Ethnicity.[22]

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15 *Daigle* v. *Gulf Utilities Co.*, Local 2286, 794 F.2d 974, 978-79 (5th Cir. 1986); *Eitel* v. *Holland*, 787 F.2d 995, 1000 (5th Cir. 1986); *Rayborn* v. *Mississippi State Board of Dental Examiners*, 776 F.2d 530, 532 (5th Cir. 1986).

16 *Roe* v. *Abortion Abolition Society*, 811 F.2d 931, 933-936 (5th Cir. 1987) (rejected class of those who do not share the defendant's anti-abortion views based on religion; protected classes are rabe and possibly religion).

17 *McLean* v. *International Harvester Co.*, 817 F.2d 1214, 1218-1219 (5th Cir. 1987) (caution beyond race, but cited pre-*Scott* Fifth Circuit cases allowing classes of 1) immutable characteristic such as race, national origin or sex; and 2) political beliefs and associations).

18 *Mississippi Women's Medical Clinic* v. *McMillan*, 866 F.2d 788 (5th Cir. 1989) (class of "women of childbearing age who seek medical attention from the [plaintiff clinic]" was "so under-inclusive as to mischaracterize the dispute" and *did not* constitute a proper class. Insufficient "class-based invidiously discriminatory animus" as "the animus of the protestors is to dissuade *anyone* who contributes to the incidence of abortions," including "men, women of all ages, doctors, nurses, staff, the female security guards, etc." *Id.* at 794-95. The Petitioners in the case at bar have this identical broad animus).

19 *Conklin* v. *Lovely*, 834 F.2d 543, 549 (6th Cir. 1987).

20 *Damato* v. *Wisconsin Gas Co.*, 760 F.2d 1474 (7th Cir. 1985) (rejecting class of handicapped, race only); *Grimes* v. *Smith*, 776 F.2d 1359 (7th Cir. 1985) (race only).

21 *Volk* v. *Koler*, 845 F.2d 1422, 1434 (7th Cir. 1988).

22 *Conroy* v. *Conroy*, 575 F.2d 175, 177 (8th Cir. 1978).

Ninth	Intra-Circuit Panel Conflict: 1) Race only;[23] 2) Sex;[24] and 3) Classes granted special protection by Congress or courts.[25]
Tenth	Restricted to race, in accordance with Congressional intent and this Court's decision in *Scott, supra.*[26]
Eleventh	Race alleged; issue at beyond race not reached[27]
D.C.	Race and Political affiliations with Racial overtones.[28]

The range of class-based animus currently extends from a strict adherence to race, all the way to women in general and especially women "abortion seekers". Of all the circuit courts, the Second Circuit, by its reasoning, has cast Section 1985(3) the furthest into uncharted waters:

> By its very language § 1985(3) is necessarily tied to *evolving notions of equality and citizenship.* As conspiracies directed against women are inherently invidious, and repugnant to the notion of equality of rights for all citizens, they are therefore encompassed under the Act. (Emphasis added) (A-40)

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23 *Gibson* v. *United States*, 781 F.2d 1334, 1341 (9th Cir. 1986) (race only); *National Abortion Federation* v. *Operation Rescue*, 721 F.Supp. 1168 (C.D.Cal. 1989) (rejecting "women seeking abortions").

24 *Reichard* v. *Life Ins. Co.*, 591 F.2d 499, 505 (9th Cir. 1979) (a class of women in general who purchase disability insurance); *Portland Feminist Women's Health Center* v. *Advocates for Life, Inc.*, 712 F.Supp. 165, 169 (D.Or. 1989) (following *Reichard*, "women seeking abortions" approved).

25 *Schultz* v. *Sundberg*, 759 F.2d 714, 718 (9th Cir. 1985) (beyond race if Congress or courts have given class special protections).

26 *Wilhelm* v. *Continental Title Co.*, 720 F.2d 1173, 1177 (10th Cir. 1983); *Brown* v. *Reardon*, 770 F.2d 896 (10th Cir. 1985).

27 *Brown* v. *Masonry Products, Inc.*, 874 F.2d 1476 (11th Cir. 1989). *Arnold* v. *Board of Educ. of Escambia County, Ala.*, 880 F.2d 305 (11th Cir. 1989).

28 *Hobson* v. *Wilson*, 737 F.2d 1, 21 (D.C. Cir. 1984); *Bois* v. *Marsh*, 801 F.2d 462 (D.C. Cir. 1986) (Open question beyond racial animus, but dissent would hold gender discrimination within Section 1985(3)).

Contrast this open-ended jurisprudence to the more prudent approach of the Tenth Circuit:

> In summary as to the *Scott* opinion, we find nothing therein to give any encouragement whatever to extend . . . [Section] 1985 to classes other than those involved in the strife in the South in 1871 with which congress was then concerned. In fact from *Scott* we get a signal that the classes covered by . . . [Section] 1985 should not be extended beyond those already expressly provided by the Court.[29]

Despite the cautions from this Court in *Griffin*[30] and *Scott*[31], the Second Circuit has brashly ignored the wisdom of limiting Section 1985(3). While giving lip service to Congressional intent and *Scott*, the Second Circuit has vastly extended the reach of this statute to protect almost any conceivable subgroup of the majority of the American population, recklessly opening a Pandora's Box of claims and claimants Congress never intended to be covered by the statute. *Wilhelm*, 720 F.2d at 1176; *Harrison*, 766 F.2d at 161. Combined with a broad reading of animus—defined as a "person's basic attitude or intention"—any subgroup of a generally protected class, regardless of its limit or description can now obtain Section 1985(3) relief, even though a conspiracy may only tangentially affect them. Section 1985(3) is thus transformed into the "general federal tort law" this Court warned against in *Scott*, 463 U.S. at 834.

Judge A. Wallace Tashima has cogently explained why this same class of "women seeking abortions is not a class intended to be protected by the Ku Klux Klan Act."[32]

> The Court disagrees with the proposition that any "particular [sub]class of women," *id.*, is a protected class.

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29 *Wilhelm* v. *Continental Title Co.*, 720 F.2d 1173, 1176 (10th Cir. 1983).

30 *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971).

31 *United Brotherhood of Carpenters and Joiners, Local 610* v. *Scott*, 463 U.S. 825 (1983).

32 *National Abortion Federation* v. *Operation Rescue*, 721 F.Supp. 1168, 1170 (C.D. Cal. 1989).

> For if the animus is directed at a particular class of women, then, by definition, it is not directed at other classes of women or at women as a class. If that is so, then the discrimination cannot be gender-based, it separates persons of the same gender from each other and, obviously, on a basis other than by gender. *The inquiry*, thus, *must be made without respect to gender, i.e.*, it is the *"seeking abortion" trait which animates the defendants' actions* and must be the basis for making the . . . [Section 1985(3)] analysis.[33] (Emphasis added).

This "abortion seeker" rationale reflects the factual reality of Operation Rescue demonstrations. The general class of women the Second Circuit attempted to create had no relationship to the Petitioners' actions and should be rejected by this Court.

As this Court has held:

> [T]here must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.[34]

Petitioners respectfully urge this Court to define the parameters of "animus." Is it merely "a person's basic attitude or intention,"[35] or is it "ill-will" or "a prejudice against a group of persons or against a particular person because of his membership in that group"?[36] And should not "the class

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33 721 F.Supp. at 1171. In footnote 4 to this section, Judge Tashima notes the illogical extension of this argument. If women are a protected class, then all subclasses of women are protected. Likewise, if men are an unprotected class, then all subclasses of men are unprotected. "Therefore, *e.g.*, a class of homosexual women would be protected, but a class of homosexual men would not be." *Id.* at 1171 n.4.

34 *Griffin* v. *Breckenridge*, *supra*, 403 U.S. at 102.

35 *N.Y. State Nat. Organization for Women* v. *Terry*, *supra*, (A-42).

36 *Roe* v. *Abortion Abolition Society*, 811 F.2d 931, 934 (5th Cir. 1987).

animus alleged be consistent with the deprivation of rights alleged."[37] The Petitioners submit that the animus or motivation of the conspiracy, *i.e.*, "those at whom the conspiracy was aimed" is the proper interpretation.[38]

In this case not only is the class of "women seeking abortions" inappropriate, but the alleged "animus" against them is wholesale fiction. Truth has come full circle where peaceful non-violent pro-life demonstrators, many of whom are praying for abortion seekers, are charged with animus against women similar to the Ku Klux Klan's hatred of Blacks and their supporters. Not only is the parallel wholly lacking, the application of the Ku Klux Klan Act against them is an unprincipled legal fiction of technical form and only serves to keep the federal courts embroiled in abortion litigation in the Post-*Webster* era in a manner that was not intended by Congress.[39]

II. The Second Circuit Erroneously Held That Brief Non-Violent Sit-In Demonstrations on Public Sidewalks Implicate The Right to Travel.

Relying on a holding from *Doe* v. *Bolton*, 410 U.S. 179, 200 (1973), that State residency requirements for abortions are inconsistent with the Privileges and Immunities Clause, together with a reference to the right against private discrimination created by the Supreme Court in *Griffin* v. *Breckenridge*, 403 U.S. 88, 105-06 (1971), the Second Circuit concluded that the Petitioners' sit-in demonstrations on public sidewalks have denied the Respondents' constitutional Right to Travel (A-43 to 44).

As a threshold matter, there is no Right to Travel case factually analogous to Rescue demonstrations of the type involved in this case. Such decisions involve infringement of the Right to Travel by state action, principally through dis-

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37 *Lopez* v. *Arrowhead Ranches*, 523 F.2d 924, 928 (9th Cir. 1975).

38 *Mississippi Womens' Medical Center* v. *McMillan*, 866 F.2d 788, 794 (5th Cir. 1989).

39 *Webster* v. *Reproductive Health Services*, 492 U.S. _____, 106 L.Ed.2d 410 (1989).

criminatory residency requirements.[40] The Right to Travel in its classic meaning ensures new residents the same right to *vital governmental benefits and privileges* in the states to which they migrate as they are enjoyed by other residents. *Califano* v. *Gautier Torres*, 435 U.S. 1 (1978).

In analyzing Rescue demonstrations, Judge Tashima has commented: "Whatever other legal rights and liabilities may be implicated by such conduct, there is no federal privilege or immunity of one class of persons not to have another class of persons engage in non-violent, civil disobedience."[41]

In the present case, Respondents did not draw any evidence of denial of the Right to Travel to any specific identifiable women. The case rests solely on the *generalized* allegation of *possible* impacts on some women who *may* perceive some difficulty in obtaining an abortion in another jurisdiction. Furthermore, it is clear that out-of-state abortion seekers are treated no differently than those in the State of New York.

Under the decision of the Second Circuit, even if the constitutional right to an abortion is reversed, Section 1985(3) and the Right to Travel will become the vehicle not only for a continuing onslaught of future abortion litigation but for use against every other minority movement that espouses unpopular positions. The federal courts will be even further embroiled, this time as "the monitors of . . . [anti-abortion demonstration] tactics" rather than "campaign tactics," the very situation this Court wisely avoided seven years ago.[42]

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40 *See e.g.*, *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969). *Attorney General of New York* v. *Soto-Lopez*, 476 U.S. 898 (1986).

41 *National Abortion Federation* v. *Operation Rescue*, No. CV 89-1181 (AWT) slip op. at 7 (C.D. Cal. January 31, 1990) (dismissing amended complaint with prejudice).

42 *United Brotherhood of Carpenters and Joiners, Local 610* v. *Scott*, *supra* 463 U.S. at 836 (emphasis added). This Court was so clear in *Griffin* that the Ku Klux Klan Act was never "intended to apply to all tortious, conspiratorial interferences with the rights of others." *Griffin* v. *Breckenridge*, *supra* 403 U.S. at 101. *United Brotherhood of Carpenters and Joiners, Local 610* v. *Scott*, *supra*, 463 U.S. at 834.

The contention that non-violent sit-in demonstrations on public sidewalks involving hundreds of volunteers of conscience, gathering to protest abortion, rises to a purposeful constitutional violation of the interstate Right to Travel, is nothing short of constitutional ambrosia—the creation of a Federal cause of action where none exists.

III. The Second Circuit Erroneously Held That The Contempt Fines Imposed by The District Court Were Civil in Nature

On October 27, 1988, the district court held the Petitioner Randall Terry and Operation Rescue in contempt, ruling on motion papers and denying the Petitioners' request for a hearing or even an oral argument (A-78 to 103). The Petitioners submit that the unconditional imposition of the $50,000 ($25,000/day, originally payable to Respondent N.O.W. and modified by the panel to be payable to the United States) and $19,141 (payable to the City of New York for police overtime for failure to give 12 hours advance notice of the exact location of the demonstration) fines made the contempts criminal in nature, since there was no purge mechanism available to the Petitioners to comply with and escape the sanctions (A-104 to 108).

The panel reasoned that since the district court added the $25,000 sanction to its injunction *before* the Petitioners violated the TRO, the Petitioners' opportunity to comply necessarily came at that initial point (A-22 to 23). This rationale cannot be reconciled with the settled contempt jurisprudence of this Court. A recent decision of this Court summarized a century's worth of this Court's settled contempt jurisprudence:

> *If the relief provided is a fine*, it is remedial when it is paid to the complainant, and *punitive when it is paid to the court*, though a fine that would be payable to the court is also remedial when the petitioner *can avoid paying* the fine simply by performing the affirmative act required by the court's order. These distinctions lead up to the fundamental proposition that *criminal penalties may not be imposed on someone who has not been*

> *afforded the protections that the Constitution* requires of such criminal proceedings, . . . An *unconstitutional penalty is criminal in nature because it is "solely and exclusively punitive in character." Penfield Co.* v. *SEC*, 300 U.S. 585, 593, 67 S.Ct. 918, 922 91 L.Ed. 1117 (1947). • • • This Court ruled that since the man was not tried in a proceeding that afforded him the applicable constitutional protections, he could be given a conditional term of imprisonment *but could not be made to pay 'a flat, unconditional fine* of $50.00." *Penfield, supra.*

Hicks on Behalf of Feiock v. *Feiock*, 485 U.S. 624, 632-33 (1988) (citations omitted) (emphasis added). The unconditional and punitive nature of the $50,000 and $19,141 fines are manifest.

The fact that the lower courts have conveniently denominated their penalty "civil coercive contempt" (A-22 to 23) is not controlling and should not be allowed to defeat applicable protections of federal constitutional law. *Hicks* v. *Feiock*, *supra*, 485 U.S. at 631. The unconditional character of the court's contempt orders made the contempt criminal. Since none of the due process protections, required in criminal proceedings, were afforded Petitioners Randall Terry and Operation Rescue, the contempt judgments must be reversed. *Young* v. *U.S. Ex Rel. Vuitton Et Fils S.A.*, 481 U.S. 787, 798-99 (1987).

In the decision below, the Second Circuit stated "[a]bsent the threat of imprisonment, the Constitutional due process protections generally are not required in a civil contempt proceeding." (A-21) This analysis reveals the unorthodox view that due process protections are generally inapplicable to situations involving monetary sanctions. Nothing could be further from this Court's jurisprudence.[43]

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43 *Penfield* v. *Securities & Exchange Commission*, 330 U.S. 585, 592-595 (1947) (an unconditional $50.00 fine was a criminal sanction), *Union Tool* v. *Wilson*, 259 U.S. 107, 110 (1922), (a $2,500 fine payable to the court was a criminal sanction); *Nye* v. *United States*, 313 U.S. 33, 34 (1941) (unconditional fines payable to the United States carry the criminal hallmark); *Hicks* v. *Feiock*, *supra*.

Regarding unconditional versus conditional sanctions, this Court has often stated that a civil contempt sanction must have a mechanism whereby the contemnor can subsequently comply with the court's order and thereby purge himself of the contempt. *See*, *Shillitani* v. *United States*, 384 U.S. 364, 371 (1966); *Hicks* v. *Feiock*, *supra*; *Penfield* v. *Securities & Exchange Commission*, *supra*. On December 9, 1988 and November 3, 1988, when unconditional contempt judgments and fines against the Petitioners were entered, there was nothing the Petitioners could have done to purge themselves of the contempt (A-104-105, 107-108). The judgments were, therefore, *ipso facto*, criminal in nature.

The criminal nature of the contempt judgments is revealed by their punitive quality (to vindicate the authority of the court), and not as "remedial, and for the benefit of the complainant." *Gompers* v. *Buck's Stove & Range*, 221 U.S. 418, 441 (1911). The Second Circuit's decision is replete with pejorative references to the Petitioners' purported defiance (A-21 to 26). The fact that the Second Circuit modified the November 3, 1988 $50,000 Judgment to be payable to the court (the United States) and not to the private Respondent N.O.W., makes the judgment more clearly punitive in nature and not remedial and for the benefit of the complainant. Moreover, the fines are clearly "intended as a deterrent to offenses against the public"[44] and "to punish the act of disobedience as a public wrong."[45]

The Second Circuit's holding that the petitioners' opportunity to comply with the order came *before* a violation occurred only manifests, in a *tour de force* manner, the pejorative comments of Justice O'Connor in *Thornburgh*, *supra*. The purge mechanism doctrine comes into play *after* a party is adjudged in contempt, so that the sanction is imposed *with conditions* which allow the contemnor to escape the sanction by compliance with the order. This case involves, however, violations of orders to refrain from prohibited action which

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44 *Nye*, *supra*, 313 U.S. at 42. See Second Circuit discussion at A-51 (public health and safety at risk).

45 *Michaelson* v. *United States*, 266 U.S. 42, 65 (1924).

cannot be purged; the only appropriate response of a court is to punish past conduct, which is classic criminal contempt.[46]

These conditionality and purge mechanism requirements for civil contempt have been uniformly followed by other circuit courts,[47] as well as other Second Circuit decisions.[48] Apparently then, the only reason they were not applied here is the grim reality that in cases involving abortion, "a permissible reading of the [law] is to be avoided at all costs." *Thornburgh*, *supra* 476 U.S. at 812 (White, J., dissenting).

IV. The Petitioners Have Been Denied A Fair Trial on Constitutional Issues

The preemptive summary judgment upheld by the Second Circuit has denied the Petitioners an opportunity for a complete hearing with discovery on the complex factual and constitutional issues in this case, dealing with the Right to Travel, the First Amendment, the defense of "necessity" to protect human life, and the right to privacy-abortion. Other than a limited hearing with regard to issuance of a preliminary injunction, held on October 25 and 27, 1988, the trial court has effectively denied the Petitioners a full evidentiary hearing on the permanent injunction, and has tried the case and rendered judgment in favor of the Respondents on the basis of mere affidavits presented by Respondents' employees, which are flawed by hearsay and legal conclusions (A-192 to 203). Because genuine issues of material fact remain

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46 *See also*, *Crozer-Chester Medical Center* v. *Moran*, 560 A.2d 133 (Pa. 1989) (contempt against anti-abortion protester adjudged to be criminal).

47 *Douglas* v. *First National Realty Corp.*, 543 F.2d 894 (D.C. Cir. 1971); *United States* v. *Miller*, 540 F.2d 1213 (4th Cir. 1976); *United States* v. *Spectro Foods*, 544 F.2d 1175 (3rd Cir. 1976); *United States* v. *North*, 621 F.2d 1255 (3rd Cir. 1980); *In re: Stewart*, 571 F.2d 958 (5th Cir. 1978); *Falstaff* v. *Miller*, 702 F.2d 770 (9th Cir. 1983).

48 *In Re Grand Jury Witness*, 835 F.2d 437, 442 (2d Cir. 1987) *cert. denied sub nom. Arambulo* v. *United States*, 485 U.S. 1039 (1988) (stating a $50,000 fine was clearly criminal contempt); *U.S.* v. *Ayers*, 866 F.2d 571 (2nd Cir. 1989) (determinate sentence vacated because of absence of purge mechanism); *Hess* v. *New Jersey Transit Rail Operations, Inc.*, 946 F.2d 114 (2d Cir. 1988) (unconditional fine vacated).

unresolved, the district court's action, as affirmed by the circuit court, therefore, *conflicts* with existing authority and decisions of this Court.

In its summary judgment decision, the district court noted the Petitioners were not entitled to further discovery because they had "presented no evidence in their papers opposing summary judgment that would bring into question the undisputed facts on the record." (A-137 n.17) This reasoning is inexplicably narrow, in view of the fact that at the hearing of October 25 and 27, the Petitioners—despite their strenuous objection—were required by the court to put their witness and evidence on *first*, in response to the bare allegations contained in Respondents' supporting affidavits. (A-281 to 285) Petitioners' witnesses, point by point, refuted the Respondents' affidavits at that hearing (Dr. Bernard Nathanson (medical) at A-204 to 225 and Dr. Stephanie O'Callaghan (psychological and emotional) at 237 to 250). In spite of this clear factual conflict, the lower court has refused the Petitioners a reasonable opportunity to conduct discovery. *See*, Respondents' Complaint at ¶ 42 (A-164); Petitioners' Answers at ¶ 42 and ¶ 63 (A-180, 182, 188, 190).

Constitutional questions and issues of public importance should be decided only with a properly developed factual predicate, and "where the record is inadequate for the constitutional question presented or there are genuine factual issues, a motion for summary judgment should be denied." 6(2) J. Moore, *Moores Federal Practice* Sec. 56.17(10) (1988). *See*, *Board of Education, Island Trees Union Free School District No. 26* v. *Pico*, 457 U.S. 853 (1982). In *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 473 (1962), involving questions as to motive and intent, this Court said that "[t]rial by affidavit is no substitute for trial by jury which has so long been the hallmark of 'even handed justice.' " *White Motor Company* v. *United States*, 372 U.S. 253, 259 (1963). *See also*, *Motown Record Corp.* v. *Mary Jane Girls, Inc.*, 118 F.R.D. 35, 37 (S.D.N.Y. 1987).[49]

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49 In *Donahue* v. *Windsor Locks Bd. of Fire Com'rs.*, 834 F.2d 54, 58 (2d Cir. 1987), dealing with a 42 U.S.C. Sec. 1983 action involving alleged Freedom of Speech violations, Judge Kaufman, speaking for the panel,

Petitioners' intent in conducting the demonstrations in this case has been to protest abortion, to defend unborn human life and to advise and protect mothers concerning the immediate and long term consequences of abortion. This intent was directly at issue below—indeed, a finding of class-based animus was critical to upholding federal jurisdiction over Respondents' claims. *N.Y. State Nat. Organization for Women* v. *Terry* (A-41 to 43). The Petitioners, however, have been denied a full hearing in contravention of the holding in *Poller*, *supra*, and following cases.

The Petitioners' threshold evidence presented at the preliminary hearing on October 25 and 27, 1988, in the testimony of Dr. Nathanson and Dr. O'Callaghan, (A-204 to 250) refuted in detail the claims of the Respondents' supporting affidavits regarding endangerment of the mothers' health and demonstrated that "genuine issue(s) of material fact" remained for discovery and trial. *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). Despite the existence of disputed issues of "material fact," the district court entered summary judgment in favor of the Respondents. This is impermissible, for as this Court has recently stated: "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).[50]

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noted that summary judgment must "be used selectively to avoid trial by affidavit." (citing *Judge* v. *City of Buffalo*, 524 F.2d 1321 (2d Cir. 1975). *See also*, *City of Los Angeles* v. *Preferred Communications*, 476 U.S. 480 (1986) (reversing a dismissal because of inadequate record for First Amendment claims).

50 Similarly, the Second Circuit has observed that upon motion for summary judgment, a court " 'cannot try issues of fact; it can only determine whether there are issues to be tried.' " *Donahue* v. *Windsor Locks Bd. of Fire Com'rs.*, 834 at 58. "When the Court considers a summary judgment motion, it must draw all reasonable inferences and resolve all ambiguities in favor of the non-moving party." *Garza* v. *Marine Transport Lines, Inc.*, 871 F.2d 23, 26 (2d Cir. 1988); *City of Yonkers* v. *Otis Elevator Co.*, 844 F.2d 42, 45 (2d Cir. 1988).

Equally important, the district court has prematurely decided "serious constitutional questions on an inadequate record, in contravention of settled principles of constitutional adjudication and procedural fairness." *Thornburgh* v. *American Coll. of Obst. and Gyn.*, 476 U.S. 747, 815. (O'Connor, J., dissenting). The Petitioners have been summarily denied the opportunity to properly and fully present their case and, in particular to refute the Respondents' generalized and unsupported claims that the right to abortion is unduly burdened, or that the Right to Travel is abridged, let alone adversely affected, by Petitioners' Rescue activities.

The constitutional and factual questions of this case deserve a full trial and scrutiny under the discovery process. To do otherwise, would deny the Petitioners a fair adjudication, establishing a pattern of truncated, *pro forma* summary judgments for a "special" class of cases in which abortion is challenged as a matter of fact or law.

V. Petitioners' First Amendment Rights Have Been Violated By Court Orders That Imposed Unlawful Prior Restraint of Protected Speech

Petitioners' practice of non-violent sit-ins and protests is aimed at temporarily closing the entrance of abortion centers and passively demonstrating, including displaying placards, wearing armbands, counseling, persuading, singing and praying.

Operation Rescue volunteers, as a matter of conscience and deeply held personal conviction, seek to directly save the life of unborn children scheduled for abortion and to turn the heart of the nation, its legislators and jurists away from the practice of abortion on demand, through legislation and legal decisions. (A-256 to 280)

Operation Rescue specifically directs its participants in writing that all demonstrations will be peaceful and passive in nature, and requires each demonstrator to sign a pledge of non-violence. (A-257 to 258, 270 to 271) Rescues conducted in the New York City area have in fact been non-violent and peaceful.

Although under existing Supreme Court decisions, the non-violent activity of temporarily blocking entry to an abortion center is not of itself protected by the First Amendment, *Adderly* v. *Florida*, 385 U.S. 39 (1966); *Cox* v. *Louisiana*, 379 U.S. 536 (1965), the peaceful presence of demonstrators, the display of placards, and other demonstration activities such as singing, prayer, counseling and vocal persuasion, fall directly within the ambit of activity historically protected by the First Amendment. *E.g.*, *Hague* v. *CIO*, 307 U.S. 496 (1939); *United States* v. *Grace*, 461 U.S. 171 (1983); *Edwards* v. *South Carolina*, 372 U.S. 229 (1963). The question which arises in this case is: Shall public demonstrations containing elements of civil disobedience or individual acts of civil disobedience for political purposes be treated in all aspects as non-expressive conduct, deserving no First Amendment safeguards whatsoever? The reach of constitutional constraints, *if any*, on court or police action in regard to demonstrations such as Operation Rescue which include expressive conduct and non-violent acts of civil disobedience, will turn on this issue.

A. Coercive Fines, Content Discrimination And Prior Restraint

In proceedings below, the district court has issued injunctions and penalties, striking at the political content of Petitioners' message, chilling the First Amendment arena with broad restraints, buttressed by huge fines. On May 4, 1988, attorneys for Respondents and Petitioners herein appeared before the Honorable Robert J. Ward, U.S.D.J. Southern District of New York, to argue a show cause for violation of a TRO against Petitioners' sit-in demonstrations at New York City abortion clinics (during the period of May 1-6, 1988) originally entered by the Supreme Court of the State of New York on April 28, 1988. Without hearing evidence of irreparable harm, Judge Ward adopted the Temporary Restraining Order issued against Petitioners by the New York State Court, and additionally modified it by adding a prospective $25,000 per day fine for violation of the TRO provisions,

together with costs expended by the City of New York for police presence at the demonstrations. (A-53 to 55)

In discussing disposition of a potential coercive fine imposed for violation of the TRO, Judge Ward, *without* request from the Respondents, indicated that he was planning ultimately to have the fine paid to the Respondents. The following exchange of remarks occurred:

> MR. COLE: [for the Respondents] "Well no, it is for the purpose of coercing compliance. If $25,000 doesn't work, then it is appropriate to increase the penalty. However, my understanding is that that penalty goes to the Court, not to Respondents."
>
> THE COURT: "Oh, no. The way I understand this business of coercion is that I can direct the penalty to be paid in any way I deem appropriate. Partly, I would suggest, I would be considering that the penalty be paid in such a way as to encourage compliance. I think if I may say so, the most effective way to do that would be to direct that the payments be made to the Respondent or Respondents. I don't think that is something that the petitioners would be happy with, but *I would certainly suggest that if I were made to pay someone who I considered my—, I won't say enemy, I won't say that—a person who has a different point of view who might then use the money to buy advertising space and do other things to counter-attack my attack, I think the whole thing might turn into a rather interesting political exercise. But that is for another day.* (emphasis added)

By court opinion dated October 27, 1988, Judge Ward found Petitioners Randall Terry and Operation Rescue to be in Civil Contempt of the Court's May 5th Order for demonstrations held on May 5th and 6th, 1988 and assessed a penalty of $50,000, which was ordered to be "paid to plaintiff National Organization of Women and disbursed among the remaining respondents according to its discretion." (A-104)[51]

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51 The district court additionally found Petitioners Terry and Operation Rescue liable to pay City of New York excess police costs, and subsequently ordered $19,141 to be paid by Petitioners. (A-106 to 108)

In the first instance, as subsequently held by the circuit court on appeal in this case, the district court had no authority to order coercive penalties to be paid to the Respondents. (A-27 to 29). The penalties in this case were unequivocally identified as "coercive". More importantly, the Judge's remarks on May 4th reveal with astounding clarity the court's intention to punish and coerce the Petitioners by making money available to Respondents *for the express purpose of opposing and "counterattacking" Petitioners' political beliefs*. No case, no principle of law, can support an implicitly intentional court use of the system of justice to undermine or resist the Petitioners' First Amendment cause, in order to coerce behavior. Cases regarding impermissible government discrimination against the content of First Amendment speech activity underscore this tenet.[52]

It is particularly egregious that in providing $25,000 daily fines, the court made no substantial inquiry into the financial ability of the *individual Operation Rescue participants* to pay such fines, although the court's order and threatened fines applied to every participant with actual notice. In *Dole Fresh Fruit Co.* v. *United Banana Co., Inc.*, 821 F.2d 106, 110 (2d Cir. 1987), the Second Circuit held that before imposing coercive penalties a trial court must explicitly consider (1) the character and magnitude of the harm threatened by the continued contumacy; (2) the probable effectiveness of any suggested sanction in bringing about compliance; and (3) the contemnor's financial resources and consequent seriousness of the burden of the sanction upon him."[53] In this case the court was advised that counsel believed that Petitioner Terry was essentially without funds.

But, the district court, without considering this or evaluating the other applicable standards, insisted upon levying a severe coercive penalty that ignored *the chilling effect of the*

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52 *Police Department* v. *Mosley*, 408 U.S. 92 (1972); *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490 (1981); *Erznoznik* v. *Jacksonville*, 422 U.S. 205 (1975); *Pickering* v. *Board of Education*, 391 U.S. 563 (1968).

53 *But see, United States* v. *Ruggiero*, 835 F.2d 443 (2d Cir. 1987) (defense attorney's silence in regard to petitioner's financial resources).

generally publicized $25,000 daily fine upon certain clearly protected First Amendment demonstration activities.[54]

Although Respondents ingeneously urged, and the district court went on to hold, that the highly trained and experienced New York Police Department could not cope with the Rescue demonstrations (thereby justifying the imposition of $25,000 penalties on demonstrators), the record is clear that New York Police Department, after viewing videotapes of similar Rescue sit-ins, had advised a New York State court that they were quite able to handle such demonstrations.[55]

In *Carroll* v. *Commissioners of Princess Anne*, 393 U.S. 175, 180-181 (1968), where an *ex parte* restraining order had been issued by a state court, prohibiting further rallies of a

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54 In the contempt opinion of October 27th herein, the district court recited the requirements of *Dole Fresh Fruit Co., supra*, but failed however, to give specific consideration to part (1) or (2) thereof and only briefly referred to the TRO Hearing of May 4th in regard to part (3). At a further hearing conducted on May 6, 1988, Judge Ward stated: "I was well aware that the TRO was not likely to stop a group as committed as this one. Indeed, it did not. So I used what I thought was reasonable judgment." The implication of these facts in regard to part (2) of the *Dole Fresh Fruit Co., supra*, requirements and in light of potential criminal charges clearly facing demonstrators for obstructing entrance to abortion clinics, point to an excessive, ineffective penalty, punishing Rescue participants acting as a matter of conscience to protest abortion and save human life. Judge Ward's tacit solicitation from Respondents that jail penalties should not be imposed, to avoid creating "martyrs," points directly to the Court's not insignificant concern with First Amendment implications of Petitioners' demonstrations, rather than applying a reasonable penalty to coerce behavior.

55 When considering a similar case where a TRO was being sought against Operation Rescue demonstrations planned in the Boston area, the United States Court of Appeals for the First Circuit *denied* the appeal of a lower court ruling against granting a preliminary injunction, indicating that the Massachusetts authorities and police could be expected to properly safeguard the rights of the Appellants and their patients. Upon a renewed motion for a temporary restraining order, after Operation Rescue demonstrations in Boston, the district court in this case again refused the requested injunction. *Planned Parenthood* v. *Operation Rescue*, Civil Action No. 88-2329-NA (D.Mass. October 19, 1988); *Planned Parenthood* v. *Operation Rescue*, Appeal No. 88-2047 (1st Cir. October 21, 1988); *Planned Parenthood* v. *Operation Rescue*, Civil Action No. 88-2329-MA (D.Mass. October 26, 1988).

"white supremacist" organization, the Supreme Court observed that:

> Ordinarily the states' constitutionally permissible interests are adequately served by *criminal penalties* imposed *after* freedom to speak has been so grossly abused that its immunity is breached. *The impact and consequences of subsequent punishment for such abuse are materially different from those of prior restraint.* (Emphasis added.)

The lower courts herein had a more than reasonable basis to allow New York City authorities to enforce the law and seek criminal penalties as necessary with regard to Rescue demonstrations—as the First Circuit has decisively chosen to do. Instead, they departed from the presumption protecting political protest and the exercise of the First Amendment and imposed a severe regime of prior restraint that impermissibly chilled political protest. *The inevitable effect of the $25,000 daily fines has been reinforced by the district court's recent imposition of a total of $450,000 in new fines against 10 individuals for injunction violations, including $100,000 additional fines against Randall Terry and Operation Rescue. N.Y. State Nat. Organization for Women* v. *Terry*, No. 88 Civ. 3071, slip op. at 53-54 (S.D.N.Y. Feb. 27, 1990).

Reporting on implications of the court's decision, the New York Times noted that, "Lawyers for the National Organization for Women, as well as some of the protestors, said that potential demonstrators might be deterred from participating in demonstrations because they could be held personally liable," " 'It's a warning to individuals," said Mary G. Gundrum, an attorney at the Center for Constitutional Rights who represented N.O.W. and several clinics . . . "*Individuals are now put on notice that if they choose to participate, they will be personally liable.*' " *The New York Times*, Feb. 28, 1990, B1, col. 5. (emphasis added)

In *Spallone* v. *United States*, ____ U.S. ____ 58 U.S.L.W. 4103, 4105 (1990), this Court stated the ancient maxim in regard to coercive sanctions that "a court must exercise [t]he *least possible power* adequate to the end proposed." Quoting *Anderson* v. *Dunn*, 6 WHEAT (19 U.S.) 204, 231 (1821). "[A]

district Court, in exercising the awesome power of contempt, must turn square corners." *United States* v. *Edgerton*, 734 F.2d 913, 915 (2d Cir. 1984). "When First Amendment rights are involved we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer." *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966).

In *Pittsburgh Press Co.* v. *Human Relations Commission*, 413 U.S. 376, 390 (1973), dealing with prior restraint of advertisement, the Court characterized the effect of such conduct, stating that "[t]he special vice of a prior restraint is that communication will be suppressed, either directly or by *inducing excessive caution in the speaker* before an adequate determination that it is unprotected by the First Amendment." (emphasis added) *See also*, *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 433 (1963).

In this regard, the enormously disproportionate fines employed by the lower court herein are on their face and as applied, unconstitutional, bearing no reasonable relationship to the meager, unsubstantiated evidence of alleged harm, in the face of broad First Amendment implications of Rescue demonstrations.

B. The *O'Brien* Standard and *Spence* v. *Washington*

In *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968), it was said: "This Court has held that when 'speech' and nonspeech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." The Court continued, explaining its reasoning:

> [A] government regulation is sufficiently justified [1] if it is within the constitutional power of the government; [2] if it furthers an important or substantial governmental interest; [3] *if the governmental interest is unrelated to the suppression of free expression*; [4] *and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to furtherance of that interest*. 391 U.S. at 377. (emphasis added).

In light of the trial court's express and implied intention regarding the political content of Petitioners' First Amendment activities, and the plainly excess, unjustified nature of fines imposed against Petitioners, it is evident that the court's actions fail the latter two requirements set forth in *O'Brien*.

The Supreme Court has further held:

> "In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it.' "

Texas v. *Johnson*, 491 U.S. ____, 109 S.Ct. 2533, 2539 (1989), quoting *Spence* v. *Washington*, 418 U.S. 405, 410-411 (1974).

Rescue demonstrations only temporarily block entrance to abortion clinics and cannot in their own right save the lives of more than a few unborn children. (A-256 to 280) *The "expressive" component of these demonstrations is nevertheless great.* They include picketing, posters, singing, counseling and prayer, as well as a cumulative message to the world that the evil of abortion should be arrested. The question arises: Shall public demonstrations containing elements of civil disobedience or individual acts of civil disobedience for political purposes, be treated in all aspects as non-expressive conduct, deserving no First Amendment safeguards whatsoever?

The Petitioners respectfully submit that minimal protections under the First, Fifth and Fourteenth Amendments require an articulable standard of reasonableness in measuring sanctions against individuals who participate in Rescue demonstrations, particularly in light of the availability of state criminal enforcement and civil damages. Before assessing sanctions in dealing with public demonstrations containing elements of civil disobedience for political purposes, the court should give explicit consideration to the following suggested criteria:

- The character and extent of expressive conduct falling within First Amendment protection

- The probable impact of sanctions on First Amendment demonstration activity
- The probable effectiveness of suggested sanctions in bringing about compliance which cannot be achieved by normal criminal sanctions and civil remedies.

See also, United States v. *O'Brien*, *supra*, 391 U.S. at 376; *Dole Fresh Fruit Co.* v. *United Banana Co., Inc.*, *supra* at 110.

VI. The Second Circuit Erred In Conferring Article III Standing on the Respondents and Respondent-Intervenor

The Petitioners have asserted, from inception, that the Respondents have no Article III standing to maintain this action, nor seek the class-wide injunctive relief that they have been granted, as the Respodnents have utterly failed to plead or produce evidence of Article III direct injury. *Los Angeles* v. *Lyons*, 461 U.S. 95, 102-103 (1983). *See*, *Roe* v. *Operation Rescue*, No. 88-5157, slip. op. (E.D. Pa., December 19, 1988). The respondents fail to meet the required standards for organizational or representative standing, as the claim asserted "requires the participation of individual members in the lawsuit," and the necessary proof can not be presented "in a group context." *New York State Club Association* v. *City of New York*, 487 U.S. 1, ____ n.4 (1988).

The complaint filed by the City does not contain the requisite allegations of a "personal stake" in the outcome of the litigation. *See*, *City of Milwaukee* v. *Saxbe*, 546 F.2d 693, 698 (7th Cir. 1976) ("Unless the City has alleged an injury to itself, it can establish standing only as a representative of its citizens who have been injured in fact.") *See also*, *Rizzo* v. *Goode*, 423 U.S. 362, 371-73 (1976). In the absence of standing, the City had no right to invoke the district court's remedial powers and its purported pendant party claim should have been dismissed.[56] *Finley* v. *United States*, ____ U.S. ____, 109 S.Ct. 2003 (1989).

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56 *See*, *Prince George's County, Maryland* v. *Levi*, 79 F.R.D. 1, 5 (D.Md. 1977); *Commonwealth of Pa. ex. rel. Rafferty* v. *Philadelphia Psychiatric Center*, 356 F.Supp. 500 (E.D. Pa. 1973).

VII. The Second Circuit's Awards of Cost Under Rule 37(A)(4) Jointly And Severally Against Petitioners And Their Counsel Was Arbitrary And An Abuse Of Discretion

As the district court recited in its August 31, 1988, Order, the discovery sought by Respondents and by intervenor City of New York from Petitioners Terry and "Operation Rescue" was "in connection with their then pending contempt motion" (A-57). The discovery on its face seriously implicated Mr. Terry's Rights to Freedom of Speech, Freedom of Association, Freedom of Religion and Personal Privacy, guaranteed by the First, Fourth and Fourteenth Amendments, and his Privilege Against Self-Incrimination, guaranteed by the Fifth Amendment. Petitioners opposed Respondents' motion to compel and sought a protective order in order to preserve Mr. Terry's constitutional Rights and Privileges and to permit Petitioners to obtain a ruling on whether the Court had Article III jurisdiction before subjecting Mr. Terry, who was not sued as a party in his personal capacity, to merits discovery. Petitioners also sought to prevent respondents from using the fruits of such discovery in other actions they had brought or threatened to bring against petitioners.

The district court declined to follow this Court's decision in *United States Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988) and summarily rejected Petitioners' request for a protective order. The court also impermissibly narrowed the constitutional protections afforded to citizens engaged in non-violent civil disobedience and public advocacy of unpopular but deeply held religious, political and moral convictions and penalized Petitioners for their attempt to assert their constitutional Rights and Privileges. Finally, the court arbitrarily imposed sanctions upon attorneys engaged in *pro bono* representation of such dissenters, thereby threatening to discourage members of the federal bar from fulfilling their professional ethical obligation to provide vigorous and fearless defense to citizens who espouse unpopular causes and seek by their protests to chal-

lenge the failure of government to remedy what they believe to be a pernicious and inhuman injustice.

The district court's imposition of costs was particularly inappropriate here because it was imposed jointly and severally on Petitioners *and their counsel.* The district court's rationale affirmed by the Second Circuit, for this extraordinary discovery sanction is that "Terry invoked privileges almost entirely on advice from his counsel." (A-36). According to Professor Moore,

> "expenses should be charged to the attorney only if the failure to make discovery was principally at his instigation." 4A J. Moore, *Federal Practice* ¶ 37,02 [10.-4] (2d ed. 1988).[57]

As the court of appeals noted in *Weisberg* v. *Webster*, 749 F.2d 864, 873-74 (D.C. Cir. 1984), even where the imposition of costs under Fed.R.Civ.P. 37(a)(4) on a party may be justified, it does not automatically follow that it is proper to impose costs on that party's attorney. Rather, specific findings of *separate grounds* are required to sustain the imposition of costs on the attorney:

> "This requirement of findings to support an award of expenses against an attorney is prompted by the structure of Rule 37, by concerns for effective appellate review, and by concerns for the tension created in the attorney-client relationship when the attorney is subject to personal liability."

Id. at 874.[58]

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57 *See also, Crawford* v. *American Federation of Government Employees*, 576 F.Supp. 812, 815 (D.D.C. 1983) ("an award ought to be made against the attorney only when it is clear that discovery was unjustifiably opposed principally at his instigation"); *Humphreys Exterminating Co.* v. *Poulter*, 62 F.R.D. 392, 395 (D. Md. 1974); *Hulvat* v. *Royal Indemnity Co.*, 277 F.Supp. 769, 771 (E.D. Wis. 1967).

58 *See also, Reygo Pacific Corp.* v. *Johnston Pump Co.*, 680 F.2d 647, 649 (9th Cir. 1982); *Stillman* v. *Edmund Scientific Co.*, 522 F.2d 798, 801 (4th Cir. 1975); *1970 Advisory Committee Note to Rule 37(a)(4)*, quoted in 4A J. Moore, *Federal Practice* ¶ 37.01 [8], pp. 37-22 to 23 (2d ed. 1988).

Moreover, where there is a legitimate dispute as to the propriety of discovery with First and Fifth Amendment implications, effective representation by counsel requires that discovery disputes be brought to the court for resolution and opposition to a motion to compel in those circumstances should be presumed to be substantially justified. *See*, *Pierce* v. *Underwood*, 487 U.S. 552 (1988). Therefore, imposition of costs on petitioners *and their counsel* here was an unwarranted abuse of discretion. *See*, *e.g.*, *Spevack* v. *Klein*, 385 U.S. 511 (1967) (prohibiting "the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly.' ")

CONCLUSION

It is respectfully submitted that Petitioners' petition for certiorari should be granted and that the issues raised therein should be addressed by the justices of this Court.

Dated: March 5, 1990
New York, New York

Respectfully submitted,

/s/ JOSEPH P. SECOLA

MICHAEL P. TIERNEY
80 Pine Street
New York, N.Y. 10005
(212) 701-3524

A. L. WASHBURN, JR.
10 Brennan Place
Deer Park, N.Y. 11729
(914) 243-6514

JOSEPH P. SECOLA
GEORGE J. MERCER
LAWRENCE S. WALTERS, JR.
The Rutherford Institute of Connecticut
P.O. Box 3196
Milford, Connecticut 06460
(203) 355-0923

Attorneys for Petitioners

APPENDIX D

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FLORENCE TALLUTO, ET AL.,

Petitioners,

- v. -

PLANNED PARENTHOOD MARGARET SANGER CLINIC (MANHATTAN), ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

A. LAWRENCE WASHBURN, JR.
MICHAEL P. TIERNEY
Legal Center for the
Defense of Life
286 Fifth Avenue,
Suite 707
New York, NY 10001
(212) 695-1955

JOSEPH P. SECOLA
(Counsel of Record)
The Rutherford Institute
of Connecticut
P.O. Box 1108
8 South Main Street
New Milford, CT 06776
(203) 355-0923
Attorneys for Petitioners

QUESTIONS PRESENTED

I. Do "women seeking abortions" constitute a valid class for purposes of "class animus" requirement of 42 U.S.C. section 1985(3)?

II. Is opposition to abortion *per se* discrimination against women for purposes of "class animus" requirement of 42 U.S.C. section 1985(3)?

III. Do purely private actors who hinder access to an abortion facility violate a federal constitutional right to interstate travel merely because some patrons of the facility come from out of state?

IV. Are Respondents' claims under 42 U.S.C. section 1985(3) so insubstantial as to deprive the federal courts of subject matter jurisdiction?

OPINIONS BELOW

The opinion of the court of appeals (set forth at pages A-1 to 52 of the Appendix to this Petition) is reported at 886 F.2d 1339 (2d Cir. 1989). The district court opinion on discovery and sanctions is unreported (set forth at pages A-56 to 74 of the Appendix). The district court opinion on contempt (set forth at pages A-78 to 103 of the Appendix) is reported at 697 F.Supp. 1324 (S.D.N.Y. 1988). The district court summary judgment opinion (set forth at page A-115 to A-143 of the Appendix) is reported at 704 F.Supp. 1247 (S.D.N.Y. 1989).

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1989 (A-151 to 152). The order of the court of appeals denying the petition for rehearing *en banc* was entered on November 7, 1989 (A-147 to 148). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). A timely motion for extention of time to file this petition to March 5, 1990, was granted by Mr. Justice Marshall on January 29, 1990, Application No. 89-534.

STATUTORY PROVISIONS

Section 1985(3) of Title 42 of the United States Code ("Section 1985(3)") is set forth at page A-153 to 154 of the Appendix.

STATEMENT OF THE CASE

The decision of the Second Circuit affirming with one modification five judgments and orders of the district court has created an unprecedented body of rulings in clear contradiction of binding precedents of this Court. Given the ongoing national debate over abortion and the First Amendment implications of the panel's opinion, Petitioners respectfully submit that the vital issues raised in this appeal should be addressed by this Court.

PARTIES

The Petitioners are as follows: Florence Talluto, Reverend Robert Pearson, Reverend Jesse Lee, Joseph Foreman, Michael McMonagle, Jeff White, Michael LaPenna and Christopher Slattery.

The Petitioners were each non-party contempt respondents in the district court and appellants in the court of appeals. The following were defendants in the district court and were appellants in the court of appeals but are not presently Petitioners: Randall A. Terry, Operation Rescue and Thomas Herlihy. Non-party contempt respondent B.O.R.N. is also not a Petitioner. Contempt was not sought against defendant Reverend James P. Lisante.

The Respondents are as follows: Planned Parenthood Margaret Sanger Clinic (Manhattan); New York State National Organization for Women; New York State Chapter of the National Organization for Women; National Organization for Women; Religious Coalition for Abortion Rights-New York Metropolitan Area; New York State National Abortion Rights Action League, Inc.; Planned Parenthood of New York City, Inc.; Eastern Women's Center, Inc.; Planned Parenthood Clinic (Bronx); Planned Parenthood Clinic (Brooklyn); Ob-Gyn Pavilion; The Center for Reproductive and Sexual Heath; VIP Medical Associates; Bill Baird Institute (Suffolk); Bill Baird Institute (Nassau); Dr. Thomas J. Mullin, Bill Baird, Reverend Beatrice Blair; Rabbi Dennis Math; Reverend Donald Morlan and Pro Choice Coalition. The Respondents were each plaintiffs in the district court and appellees in the court of appeals.

An Intervenor in the district court was the Respondent City of New York, which pressed a state law public nuisance claim. The City of New York did not seek contempt citations against

either the defendants or non-party Petitioners in the proceedings at issue in the courts below.

Non-Petitioners E.O.R.N. and Operation Rescue are not a corporations under Rule 28.1 of the Rules of this Court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

DECISIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3
A. Course of Proceedings 4
B. Statement of Facts 6

REASONS FOR GRANTING THE WRIT 9

I. The underlying injunctive orders of the district court enforced by purportedly civil contempt fines and penalties rest on the identical legal grounds at issue in a case presently before this Court, *Jane Bray et al. v. Alexandria Women's Health Clinic, et al.*, No. 90-985. 9
1. Federal Jurisdiction 9
2. The Right to Interstate Travel 12
3. Class Animus 14

CONCLUSION 15

APPENDICES

Appendix A:	Temporary Restraining Order dated May 5, 1988	A - 1
Appendix B:	Preliminary Injunction dated October 27, 1988	A - 5
Appendix C:	Permanent Injunction dated January 10, 1989	A - 9
Appendix D:	Opinion of U.S. District Court for the Southern District of New York, February 17, 1990, 732 F.Supp. 400 (S.D.N.Y. 1990)	A - 13
Appendix E:	Order assessing contempt fines against Petitioners, May 10, 1990	A - 65
Appendix F:	Oral Bench Ruling of the U.S. District Court for the Southern District of New York, November 8, 1990	A - 68
Appendix G:	Order assessing contempt fines against Petitioner Christopher Slattery, November 8, 1990	A - 81

TABLE OF AUTHORITIES

CASES:

Attorney General of New York v. Soto-Lopes, 476 U.S. 898 (1986) 12n

Bray v. Alexandria Women's Health Clinic, *cert. granted*, ____ U.S. ____, 111 S. Ct. 1070, 112 L.Ed 2d 1176 (1991) (No. 90-985) . . . . . *passim*

Califano v. Gautier Torres, 435 U.S. 1 (1978) 13

Dunn v. Blumstein, 405 U.S. 330 (1972) 12n

Griffin v. Breckenridge, 403 U.S. 88 (1971) 12n, 15

Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) 12n

National Abortion Federation v. Operation Rescue, No. CV- 89-1181 (AWT) slip op. (C.D. Cal. January 31, 1990) 13n

National Abortion Federation v. Operation Rescue, 721 F. Supp. 1168 (C.D. Cal. 1989) 14n

New York State Nat. Org. for Women v. Terry, 704 F. Supp. 1247 (S.D.N.Y.), *aff'd*, 886 F.2d 1339 (2d Cir. 1989) 4n

New York State Nat. Org. for Women v. Terry, 886 F.2d 1339 (2d Cir. 1989), *cert denied*, ___ U.S. ___, 110 S.Ct. 2206, 109 L.Ed. 2d 532 (1990) 4n, 7

New York State Nat. Organization for Women v. Terry, *732 F. Supp. 400 (S.D.N.Y. 1990)* 1, 6, 7, 8

Shapiro v. Thompson, 394 U.S. 618 (1969) 12n

U.S. Catholic Conf. v. Abortion Rights, 487 U.S. 72, 101 L.Ed. 2d 69 (1988) 5, 10, 11

United Broth. of Carpenters and Joiners v. Scott, 463 U.S. 825, *reh'g denied*, 464 U.S. 875 (1983). 12n

United States v. United Mine Workers, 330 U.S. 258 (1947) 10, 11

STATUTES:

28 U.S.C. section 1254(1) 2

28 U.S.C. sections 1331 and 1343 4

42 U.S.C. section 1985(3) ..... *passim*

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991
NO. ____

Florence Talluto, et al.,

Petitioners

v.

Planned Parenthood Margaret Sanger Clinic (Manhattan), et al.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DECISIONS BELOW

The two decisions of the district court resulting in two contempt judgments (Appendix E: A-65 to A-67 and Appendix G: A-81 to A-82) are reported in *New York State Nat. Organization for Women v. Terry, 732 F. Supp. 400 (S.D.N.Y. 1990)* (Appendix D: A-13 to A-64) and an unreported oral bench ruling which incorporates the earlier ruling at 732 F. Supp. 400. (Appendix F: A-68 to A-80). The three underlying injunctive orders are included in the Appendices. (A-1 to A-12). The appeals from these judgments were consolidated in the court of

appeals and are presently *sub judice* with oral argument having taken place on May 20, 1991. The decision of the court of appeals has not yet been issued.

JURISDICTION

The judgments of the district court for the southern district of New York were entered on May 10, 1990 and November 8, 1990. The consolidated appeals involving the contempt fines is *sub judice* in the United States court of appeals for the second circuit. This Court has jurisdiction, under 28 U.S.C. section 1254(1) to review the judgments of the United States district court before the judgment of the court of appeals has been issued.

STATUTORY PROVISIONS

42 U.S.C. section 1985(3) provides as follows:

> If two or more persons in any State or Territory conspire to go in disguise on the highway or on the premises of another, for the purposes of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purposes of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice

President, or as a Member of Congress of the United States or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section; if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

Petitioners are eight individuals opposed to abortion who, though not parties to injunctions issued by the district court below, were nevertheless made subject to severe and coercive civil contempt fines totalling $300,000.00 for alleged violations of the injunctions.[1]

These phenomenally large fines levied against anti-establishment political protesters, for their participation in anti-abortion rescue demonstrations which have been found by the

---

[1] The district court issued three injunctions upon which the contempt fines and penalties are based: a temporary restraining order dated May 5, 1988 (Appendix A: A-1 to A-4), a preliminary injunction dated October 27, 1988 (Appendix B: A-5 to A-8) and a permanent injunction dated January 10, 1989 (Appendix C: A-9 to A-12).

second circuit to be "a form of political speech,"[2] are reminiscent of Bull Connor and the Jim Crow South.

Respondents have asserted two federal causes of action: First, a conspiracy to violate a right to travel under 42 U.S.C. section 1985(3); and second, a conspiracy to violate a privacy right to abortion, also under Section 1985(3). Respondents also asserted various pendant state causes of action including trespass. Intervenor Respondent City of New York asserted a public nuisance claim under state law and no federal claim. Federal jurisdiction in the district court was invoked under 28 U.S.C. sections 1331 and 1343.

A. Course of Proceedings

The district court had earlier issued a permanent injunction (A-9 to A-12) in this action.[3] Subsequently, the private Respondents brought orders to show cause for summary judgment of contempt against the defendants and various non-party Petitioners for participating in Operation Rescue demonstrations on May 6, 1988, October 29, 1988, January 13,

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[2] *New York State Nat. Org. for Women v. Terry*, 886 F.2d 1339, 1363 (2d Cir. 1989), *cert denied*, ___ U.S. ___, 110 S.Ct. 2206, 109 L.Ed. 2d 532 (1990).

[3] *New York State Nat. Org. for Women v. Terry*, 704 F. Supp. 1247 (S.D.N.Y. 1989) (granting a permanent injunction prohibiting the blocking of access to facilities that perform abortion), which was affirmed by the United States court of appeals for the second circuit in an opinion dated September 20, 1989; *New York State Nat. Org. for Women v. Terry*, 886 F. 2d 1339 (2d Cir. 1989) *cert. denied*, ___ U.S. ___, 110 S.Ct. 2206, 109 L.Ed. 2d 532 (1990) (affirming the district court's various underlying injunctive orders in the original action as modified to provide that previous contempt fines against plaintiffs Terry and Operation Rescue were to be paid into the court, not to the plaintiff National Organization for Women).

1989 and January 14, 1989 in violation of the temporary restraining order, preliminary injunction and permanent injunction.

The district court adjudged the Petitioners in contempt of its orders and levied alleged civil contempt fines totalling $300,000. The appeal of these huge fines was argued before the court of appeals for the second circuit on May 20, 1991, and no decision has yet been issued.

It is normal to wait until the court of appeals issues a decision before seeking a writ of certiorari from this Court. However, there is pending before this Court the case of *Bray v. Alexandria Women's Health Clinic*, No. 90-985, *infra*, which presents identical subject matter questions in the same context. This case should, therefore, be reviewed contemporaneously with *Bray*, or at least held for disposition pending decision in *Bray*. By granting the writ now, this Court will gain the benefit of the record and disposition of a nearly identical case as it considers the issues presented in *Bray*. Moreover, Petitioners will be afforded the opportunity to present their views on the issues before they are finally decided by this Court in *Bray*. The grant of a writ prior to disposition by the court of appeals is further suggested by the seriousness of the judgments at bar, i.e., for $300,000.00 in unconditional coercive civil contempt fines against eight individuals and the attendant chilling effect and mental anguish over potential collection actions.

Question 4 of the *Bray* Petition for Certiorari states: "Are Respondents' claims under 42 U.S.C. Section 1985(3) so insubstantial as to deprive the federal courts of subject-matter jurisdiction?". The 1985(3) claim is patently implausible and does not provide subject matter jurisdiction to the district court, thus depriving the district court of its ability to enforce wrongfully issued orders by civil contempt. *U.S. Catholic*

Conf. v. Abortion Rights, 487 U.S. 72, 101 L.Ed. 2d 69 (1988). See discussion *infra*.

The wholly intemperate nature of the massive contempt fines is highlighted by the $50,000 assessed against Florence Talluto, the first named Petitioner, for her political participation in two Operation Rescue anti-abortion demonstrations involving rescue blockades of abortion clinics. She is a 58 year old widow and grandmother and has been a pregnancy counselor since 1974. Her life savings consists of the remainder of the life insurance proceeds of her deceased husband and her home. She is employed as a secretary of Assumption of the Blessed Virgin Mary Roman Catholic Church in Centereach, (Long Island) New York. For participating in two Operation Rescue sponsored political demonstrations against abortion on October 29, 1988 and January 14, 1989, she was "adjudged in civil contempt and assessed coercive civil penalties in the amount of $50,000 [payable to the United States]. . . ", 732 F.Supp. at 406 (A-45 to A-46). Without this Court's aid, the federal courts, despite lacking subject-matter jurisdiction, will be responsible for impoverishing her in her twilight years. Other Petitioners include a priest, Reverend Robert Pearson, who was assessed $25,000 for one anti abortion protest and a minister, Reverend Jesse Lee, who was assessed a total of $100,000 for three demonstrations.

B. Statement of Facts

The Petitioners in this case were non-parties that the district court held in civil contempt of court and assessed $300,000 in contempt fines against them payable to the United States. *See*, Judgments at Appendices E, G (A-65 to A-67 and A-81 to A-82).

The district court acknowledged that the Petitioners had attacked the underlying orders of injunctive relief in the

contempt proceeding for lack of subject matter jurisdiction. 732 F. Supp at 400. (A-31). This attack was rejected out of hand by the district court which relied upon the earlier second circuit decision in *New York Nat. Org. for Women v. Terry, supra*, 732 F. Supp. at 400 (A-41 to A-42).

The district court found that the demonstrations in which the Petitioners participated had been organized by defendant Operation Rescue so that "protestors each day would converge on a facility where abortions were performed in an effort to close down the facility [and] . . . their purpose was to block the doors so they cannot do abortions today". 732 F.Supp at 393 (A-16), 405 (A-44).

In the earlier second circuit opinion, the circuit court recognized that the "defendants' actions clearly are a form of political speech protected by the First Amendment." 886 F.2d at 1363. The second circuit clearly acknowledged that the purpose of Operation Rescue demonstrations was to communicate the message "that abortion is wrong, immoral and must be stopped." 886 F. 2d at 1363.

As the United States has said in its Amicus Curiae Brief in Support of Petitioners' in *Bray* at p. 2-3:

> Petitioner Operation Rescue is an unincorporated association *with the principal goals of preventing abortions and ending the legalization of abortions*. Operation Rescue seeks to achieve these goals by, among other means, conducting "rescue" demonstrations at abortion clinics. . . During "rescue" demonstrations, petitioners obstruct the entrances to and exits from an abortion clinic, thereby effectively closing the clinic temporarily, preventing abortions from being performed for that period, and "rescuing"

> the fetuses that would otherwise have been aborted. Pet. App. 19a. The purpose of these demonstrations, as described in Operation Rescue's literature, is to "intervene between abortionists and the innocent victims," by "*physically* blockading abortion mills with [human] bodies." *Id.* at 20a (quoting *Operation Rescue, National Day of Rescue - October 29, 1988 (1988)*. During such a demonstration, no person - male or female - is allowed by the demonstrators to enter the clinic. (emphasis added).

For participation in one or more Operation Rescue demonstrations on May 6, 1988, October 29, 1988, January 13, 1989 and January 14, 1989, in the New York City area, the district court levied what it termed coercive civil contempt penalties and fines against the political protestors as follows:

Petitioner	TRO, Prel. or Perm. Injunction Violations	Unconditional Fines*
Florence Talluto	2	$ 50,000
Rev. Jesse Lee	4	$100,000
Joseph Foreman	2	$ 25,000
Michael McMonagle	1	$ 25,000
Jeff White	1	$ 25,000
Michael LaPenna	2	$ 25,000
Rev. Robert Pearson	1	$ 25,000
Christopher Slattery	2	$ 25,000

* 732 F.Supp. at 413-414 (A-62 to A-63)

It is these phenomenally large contempt penalties that the Petitioners seek to have vacated by this Court.

REASONS FOR GRANTING THE WRIT

I. The underlying injunctive orders of the district court enforced by purportedly civil contempt fines and penalties rest on the identical legal grounds at issue in a case presently before this Court, *Jane Bray et al. v. Alexandria Women's Health Clinic, et al.*, No. 90-985.

1. Federal Jurisdiction

This Court has under present consideration the exact legal issues which the Petitioners raise in *Bray v. Alexandria Women's Health Clinic, cert. granted*, ____ U.S. ____, 111 S. Ct. 1070, 112 L.Ed. 2d 1176 (1991) (No. 90-985), which is presently pending.

The questions presented in the *Bray* Petition for Certiorari included as Question No. 4: "Are respondents' claims under *42 U.S.C. Section 1985(3)* so insubstantial as to deprive the federal courts of subject matter jurisdiction?" *Bray Pet. Cert.* at p(i).

The "Questions Presented" section of this Petition contains the identical first four questions presented in the *Bray* case. In view of the excessive monetary penalties assessed against the Petitioners, this Court should *either grant* and consider it with *Bray or hold* this Petition pending this Court's decision in *Bray*. If this Court answers this fourth question in the affirmative, as the *Bray* Petitioners urge, then this Court can, without more, *either vacate and reverse* in their entirety the allegedly civil contempt judgments, fines and penalties assessed against the Petitioners in the case at bar *or vacate and remand* for further proceedings consistent with the *Bray* decision. As

this Court has said in *United States v. United Mine Workers, 330 U.S. 258, 195 (1947)*:

> The right to remedial relief falls with an injunction which events prove was erroneously issued . . . and a fortiori when the injunction or restraining order was beyond the jurisdiction of the court. . . If the Norris-LaGuardia Act were applicable in this case, the conviction for civil contempt would be reversed in its entirety. . . Assuming, then, that the Norris-LaGuardia Act applied to this case and prohibited injunctive relief at the request of the United States, we would set aside the preliminary injunction of December 4 and the judgment for civil contempt . . . (citations omitted).

This principle of allowing a non-party to defend a civil contempt citation by attacking the subject matter jurisdiction of the lower court to issue the order was recently affirmed in *U.S. Catholic Conf. v. Abortion Rights*, 487 U.S. 72, 101 L.Ed. 2d 69 (1988). In that case, the U.S. Catholic Conference of Bishops, a non-party, was held in civil contempt and fined $50,000 per day for disobeying a subpoena duces tecum to produce documents. The Catholic Bishops unsuccessfully challenged the subject matter jurisdiction of the district court. The court of appeals limited the Bishops defense of the civil contempt citation to the argument that "the district court lacked even colorable jurisdiction to hear the suit." 487 U.S. at 80. This Court reversed, holding that:

> When a district court elects to apply civil contempt to enforce compliance, it is consistent with that approach to allow full consideration of the court's subject-matter jurisdiction . . . Accordingly, on remand, the Court of Appeals

> must determine whether the District Court had subject-matter jurisdiction in the underlying action. If not, then the subpoenas duces tecum are void, and the civil contempt citation must be reversed "in its entirety." *Mine Workers, supra*, at 295, 91 L.Ed. 884, 67 S.Ct. 677. (487 U.S. at 79-80).

This Court by Mr. Justice Kennedy forcefully stated:

> The right of a nonparty to appeal an adjudication of contempt cannot be questioned. . . Once the right to appeal a civil contempt order is acknowledged, arguments in its legitimate support should not be so confined that the power of the issuing court remains untested. . . The challenge in this case goes to the subject-matter jurisdiction of the court and hence its power to issue the order. The distinction between subject-matter jurisdiction and waivable defenses is not a mere nicety of legal metaphysics. It rests instead on the central principle of a free society that courts have finite bounds of authority, some of constitutional origin, which exist to protect citizens from the very wrong asserted here, the excessive use of judicial power. The courts, no less than the political branches of the government, must respect the limits of their authority. (487 U.S. at 76-77).

If the Petitioners in the case at bar and the *Levy* Petitioners are correct that the highly attenuated Ku Klux Klan Act claim of Respondents is insubstantial in a jurisdictional sense, then the civil contempt judgments with their fines and penalties "must be reversed in its entirety." *Catholic Conference*, 487 U.S. at 80. (quoting *United States v. United Mine Workers*).

2. The Right to Interstate Travel

The most patently insubstantial aspect of the Respondents' purported federal claim under 42 U.S.C. Section 1985(3)[4] is the application of the right to interstate travel to Petitioners' anti-abortion demonstration activities. *See generally* Brief Amici Curiae of Daniel Berrigan, S.J. et al. in the *Bray* case (containing thorough analysis of Supreme Court decisions on the right to travel and concluding that the claims are jurisdictionally insubstantial as foreclosed by the prior decisions of this Court). As a threshold matter, there is no right to travel case factually analogous to rescue demonstrations of the type involved in this case. Such decisions involve infringement of the right to travel by state action, principally through discriminatory residency requirements.[5] The right to travel in its classic meaning ensures new residents the same right to *vital governmental benefits and privileges* in the states to which they

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[4] A *prima facie* case for relief under 42 U.S.C. Section 1985(3) must consist of alleging at least four necessary elements:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the law; (3) an act of furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

United Broth. of Carpenters and Joiners, Local 610 v. Scott, 463 U.S. 825, 828-29 (1983) (restating the test first formulated in *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971).

[5] *See e.g., Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969). *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986).

migrate as they are enjoyed by other residents. *Califano v. Gautier Torres*, 435 U.S. 1 (1978).

In analyzing rescue demonstrations, United States District Judge A. Wallace Tashima has commented: "Whatever other legal rights and liabilities may be implicated by such conduct, there in no federal privilege or immunity of one class of persons not to have another class of persons engage in non-violent, civil disobedience."[6]

As the *Bray* Petitioners assert in their Main Brief at p. 25-26:

> The implications of the holding of the court of appeals are astounding. Virtually every business located in a city situated near a state border (e.g., New York, Philadelphia, Washington, D.C., Chicago, Portland, St. Louis, Minneapolis, and so forth), as well as every business located on a major interstate route or in the vicinity of a tourist site or commercial center, will serve numerous out-of-state customers on a regular basis. According to the holding of the court below, any sit-in or mass picketing at such a business would be a federal constitutional violation. . . This Court has never recognized a constitutional right to travel of such all-encompassing scope. . . The right to travel, however, is not an unlimited right to mere physical movement. . . . There is no general federal constitutional tort of obstruction of public or private passage.

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[6] *National Abortion Federation v. Operation Rescue*, No. CV- 89-1181 (AWT) slip op. at 7 (C.D. Cal. January 31, 1990)(dismissing amended complaint with prejudice).

See, Brief Amicus Curiae of United States in the *Bray* case at Section II. The right to interstate travel is not implicated where the Petitioners rescue demonstrations have only a *mere incidental effect upon travel.*

The application of the right to interstate travel to suppress traditional non-violent civil disobedience is nothing short of constitutional ambrosia - the creation of a federal cause of action where none exists.

3. Class Animus

In the court below, the class-based animus requirement was premised upon a subset of gender: women seeking abortions. In rejecting this notion, United States District Judge A. Wallace Tashima has cogently explained why this same class of "women seeking abortions" is not a class intended to be protected by the Ku Klux Klan Act[7]:

> The Court disagrees with the proposition that any "particular [sub]class of women," *id.*, is a protected class. For if the animus is directed at a particular class of women, then, by definition, it is not directed at other classes of women or at women as a class. If that is so, then the discrimination cannot be gender-based, it separates persons of the same gender from each other and, obviously, on a basis other than by gender. *The inquiry*, thus, *must be made without respect to gender, i.e.*, it is the *"seeking abortion" trait which animates the defendants' actions* and must be the basis for making the . . . [Section 1985(3)] analysis. (emphasis added).

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[7] *National Abortion Federation v. Operation Rescue*, 721 F. Supp. 1168, 1170 (C.D. Cal. 1989).

As the United States argues in its *Bray* Amicus Curiae Brief at 15:

> Just as there is no gender-specific position concerning other moral questions, so, too, there is no specifically "male" or "female" point of view with respect to abortion. . . Respondents also overlook that a substantial number of women oppose abortion. That fact distinguishes this case from *Griffin v. Breckenridge*, in which there was no suggestion that a substantial number of blacks opposed granting blacks the right to vote. In other words, petitioners' anti-abortion demonstrations are not a form of gender based discrimination because they are aimed at a *practice*, not a type of *person*.

According to the Respondents, early American feminists, many of whom adamantly opposed abortion as the "murder of the innocents" would possess the requisite gender based animus for purposes of 42 U.S.C. Section 1985(3). *See generally*, Brief of Feminists for Life in America, et al, as Amici Curiae in the *Bray* case.

The presence of Petitioner Florence Talluto manifests the semantic gymnastics involved in holding that participation in anti-abortion blockades and demonstrations have at their root a class-based invidiously discriminatory animus by women against other women.

CONCLUSION

For the foregoing reasons and those of the *Bray* Petitioners and their Amici Curiae supporters, the Petitioners pray that this Petition be granted and that the contempt judgments assessing $300,000 in fines against the non-party

Petitioners be *either vacated and reversed* in their entirety *or vacated and remanded* for further proceedings consistent with this Court's decision in *Bray*.

Respectfully submitted,

A. LAWRENCE WASHBURN, JR.
MICHAEL P. TIERNEY
Legal Center for the
Defense of Life
286 Fifth Avenue,
Suite 707
New York, NY 10001
(212) 695-1955

JOSEPH P. SECOLA
(Counsel of Record)
The Rutherford Institute
of Connecticut
P.O. Box 1108
8 South Main Street
New Milford, CT 06776
(203) 355-0923

Attorneys for Petitioners

APPENDIX E

United States Court of Appeals
FOR THE SECOND CIRCUIT

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN; NEW YORK CITY CHAPTER OF THE NATIONAL ORGANIZATION FOR WOMEN; NATIONAL ORGANIZATION FOR WOMEN; RELIGIOUS COALITION FOR ABORTION RIGHTS - NEW YORK METROPOLITAN AREA; NEW YORK STATE NATIONAL ABORTION RIGHTS ACTION LEAGUE, INC.; PLANNED PARENTHOOD OF NEW YORK CITY, INC.; EASTERN WOMEN'S CENTER, INC.; PLANNED PARENTHOOD CLINIC (BRONX); PLANNED PARENTHOOD CLINIC (BROOKLYN); PLANNED PARENTHOOD MARGARET SANGER CLINIC (MANHATTAN); OB-GYN PAVILION; THE CENTER FOR REPRODUCTIVE AND SEXUAL HEALTH; VIP MEDICAL ASSOCIATES; BILL BAIRD INSTITUTE (SUFFOLK); BILL BAIRD INSTITUTE (NASSAU); DR. THOMAS J. MULLIN; BILL BAIRD; REVEREND BEATRICE BLAIR; RABBI DENNIS MATH; REVEREND DONALD MORLAND; PRO CHOICE COALITION,
Plaintiffs-Appellees.

CITY OF NEW YORK,
Plaintiff-Intervenor-Appellee,
-v-

RANDALL TERRY, OPERATION RESCUE, REV. JAMES P. LISANTE, THOMAS HERLIHY, JOHN DOES AND JANE DOES,
Defendants-Appellants.

SUPPLEMENTAL BRIEF FOR DEFENDANTS-APPELLANTS

MICHAEL P. TIERNEY
80 Pine Street
New York, New York 10005
(212) 701-3524

JOSEPH P. SECOLA
GEORGE J. MERCER
The Rutherford
Institute of
Connecticut
P.O. Box 3196
Milford, Ct 06460
(203) 874-9262

A. LAWRENCE WASHBURN, JR.
41 State Street, Suite 611
Albany, New York 12207
(518) 434-0756
Attorneys for Defendants-Appellants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT . . . . . [A-102]

STATEMENT OF THE CASE . . . . . [A-103]

STATEMENT OF THE ISSUES . . . . . [A-106]

STATEMENT OF THE FACTS . . . . . [A-107]

ARGUMENT . . . . . [A-108]

I. The District Court Lacked Subject Matter Jurisdiction To Grant Plaintiffs Summary Judgment And Enter A Permanent Injunction . . . . . [A-108]

II. Granting Permanent Injunctive Relief To A Class Never Certified Violated Rule 23 . . . . . [A-111]

III. The Court Erred In Granting Summary Judgment To Plaintiffs . . . . . [A-112]

A. Plaintiffs Failed To Plead Or Prove A Claim Under Section 1985(3) . . . . [A-112]

1. State Involvement . . . . . [A-112]
2. Class-Based Animus . . . . . [A-116]
3. The Right To Travel . . . . . [A-119]

B. Plaintiffs Failed To Plead Or Prove A Claim For Trespass . . . . . [A-122]

C. The City Failed To Plead or Prove A Claim For Public Nuisance . . . . . [A-125]

IV. First Amendment . . . . . [A-126]

V. Standing . . . . . [A-127]

CONCLUSION . . . . . [A-128]

PRELIMINARY STATEMENT

On January 31, 1989, Defendants filed their notice of appeal from the orders entered by the United States District Court for the Southern District of New York, Hon. Robert J. Ward, U.S.D.J., (1) denying Defendants' motion under Fed.R.Civ.P. 12(b)(1) and 12(b)(6) to dismiss Plaintiffs' Amended Complaint and Plaintiff-Intervenor City of New York's complaint and granting Plaintiffs' and the City's Cross-Motion for Summary Judgment; and (2) granting permanent injunctive relief to Plaintiffs and the City (App. 787-789).[1] On the afternoon of February 9, 1989, Defendants' counsel were informed by Staff Counsel that Appellants' Brief and Supplemental Appendix on this appeal would have to be filed on the following Tuesday, February 14, 1989. No explanation was offered by Staff Counsel for this extraordinarily short briefing schedule, the announcement of which left Defendants without even enough time to safely file a motion for an extension of time, lest they lose their right to appeal from the final judgment against them. To the extent that Defendants have therefore been compelled to file less than a complete and well-reasoned [2] brief on the merits, we respectfully submit that defendants have been denied due process on this appeal.

Since this brief is supplemental in nature, all of the factual and legal issues and arguments that were briefed in Defendants-Appellants main brief of January 20, 1989, are incorporated by reference as if fully set forth herein to be applied against the summary judgment ruling and the

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[1] References to "App. ___" with pages numbered after 736 refer to the Supplemental Appendix filed by defendants-appellants herewith, which is numbered to run consecutively from the last page of Appellants' Appendix.

permanent injunction with its $25,000/day doubling fines. All of those factual and legal positions taken against the District Court's injunctions of May 5, 1988 and October 27, 1988, and the contempt fines are a fortiori applicable against the permanent injunction, i.e. standing, lack of irreparable harm, adequate remedy at law, lack of class certification, and the First Amendment. This brief will therefore not unnecessarily engage in redundant points. The District Court's Summary Judgment Memorandum is available in Lexis and Westlaw and will be published, but a West citation is not yet available.

STATEMENT OF THE CASE

Plaintiffs commenced this action in Supreme Court, New York County, on April 25, 1988, seeking to enjoin Defendants' planned demonstrations to be carried out in the New York City area from April 30 until May 7, 1988. The previously [3] announced planned demonstrations for that week, consisted of picketing, singing, praying, chanting, holding placards, signs, and wearing armbands, and many of the protestors sat down in front of the abortion clinic, on the sidewalk, partially or fully blocking ingress and egress to an undisclosed abortion facility each day, in order to prevent abortions from being performed on that particular day.

In their complaint, Plaintiffs sought a preliminary and permanent injunction enjoining Defendants, from April 30 until May 7, 1988, or for the duration of the planned Operation Rescue, whichever was later, from obstructing access to any facility at which abortions are performed in New York City and the surrounding counties.

On May 5, 1988, the District Court granted complete injunctive relief to plaintiffs by continuing the Order signed

by Justice Cahn of Supreme Court, New York County and adding monetary sanctions of $25,000/day. Justice Ward's Order covered the period from May 2, 1988 to May 7, 1988, the full period for which plaintiffs' complaint had sought injunctive relief. The planned demonstrations actually ended earlier, on May 6, 1988.

[4] On October 26, 1988, Defendants filed their Rule 12 motion to dismiss Plaintiffs' Amended Complaint and the City's untimely Complaint. Plaintiffs and the City sought and were granted a substantial extension of time to respond to the motion.

On October 27, 1988, the District Court again granted further injunctive relief to plaintiffs, by modification and restatement of the court's May 5th injunction, which had previously expired by its terms, to cover the period from October 28, 1988 to October 31, 1988. Plaintiffs did not move to amend their complaint in order to add this request for relief to their pleading.

On the same day, the District Court issued an Opinion and Order determining the merits of the controversy between the parties relying upon undisputed facts and certain inferences from said facts. Based upon said Opinion and Order, Plaintiffs submitted a Judgment for $50,000, which was entered on November 4, 1988 and the City submitted a Judgment for $19,141, which was entered on December 9, 1988.

Defendants filed a Notice of Appeal from the November 4th Judgment on November 15, 1988 and a further Notice of Appeal from the December 9, 1988 Judgment on December 20, 1988.

[5] More than thirty days after Defendants' November 15th

Notice of Appeal from the $50,000 Judgment in favor of Plaintiffs, Plaintiffs on December 21, 1988, served a so-called motion for summary judgment. This motion was also denominated an Opposition to Defendants' second motion to dismiss the complaint, although Plaintiffs recognized and relied on the court's earlier adjudication of Defendants' first motion to dismiss and argued that it was controlling. A preliminary injunction of the newly-announced Operation Rescue demonstration for mid-January, 1989 was requested as alternative relief, if the so-called motion for summary judgment was not granted.

Defendants, by letter of December 28, 1988 requested an adjournment of the so-called motion for summary judgment and suggested, pursuant to Rule 12(h), that the District Court lacked subject matter jurisdiction to hear the motion since the case was on appeal in this Court.

On December 29, 1988, at approximately 4 P.M., the record in this action was certified by the Clerk of the District Court and filed with the Clerk of this Court with the lead docket number of 88-7873.

On December 30, 1988, in a telephone conference, the Plaintiffs' counsel and the District Court were informed that **[6]** the record had been filed in the Court of Appeals on the previous day.

The parties appeared for argument on defendants' Rule 12 motion and Plaintiffs' Rule 56 motion on January 6, 1989 (App. 737-786). At the close of the argument the District Court reserved decision on the several motions. (App. 786) Four days later the District court entered an order denying Defendants' motion to dismiss and granting summary judgment to Plaintiffs and the City (App. 488) and entered a permanent injunction (App. 489-491). The

District Court's opinion on the motions was issued on January 18, 1989 (App. 492-529). The instant appeal followed.

STATEMENT OF THE ISSUES

I. Did the District Court have jurisdiction to grant summary judgment to Plaintiffs and the City while four appeals were pending in this Court?

II. Did the District Court err in failing to dismiss the Plaintiffs' Amended Complaint and the City's Complaint for failure to state a claim?

III. Did the District Court's entry of permanent injunction violate Defendants' (and other citizens') First Amendment Rights?

[7] IV. Did the District Court err in granting Plaintiffs and the City summary judgment on their Complaints where Defendants had been completely denied discovery and had raised material issues of disputed fact?

V. Is the District Court's permanent injunction which purports to restrain non-parties in the exercise of their First Amendment Rights on public sidewalks an unreasonable restriction in time, place, manner and content in violation of the Constitution?

VI. Did the District Court err in granting permanent injunctive relief to a class of plaintiffs without any discovery, hearing or certification of a class under Fed.R.Civ.P. 23?

VII. Did the District Court err in granting permanent injunctive relief to Plaintiffs and the City that

lack standing to assert the claims alleged?

STATEMENT OF FACTS[2]

Part of the submissions in support of the Plaintiffs' summary judgment motion was two highly politically charged **[8]** affidavits of two presidents of the lead Plaintiff political organizations: New York State National Organization for Women and New York City National Organization for Women. (App. 640-653).

As part of a pattern of submissions in this case, the Plaintiffs "prove" their facts by incompetent newspaper reports. This unacceptable manner of proof forms the basis of much of the District Court's "factual" predicate in this case.

The Defendants submitted affidavits by two Rescue demonstrators, which belie any charge of violence by the plaintiffs (App. 794-800). The Rescue demonstrators were, in fact, peaceful, prayerful and non-violent.

In the Defendants opposition papers, an affidavit of co-counsel Joseph P. Secola stated that the Defendants had been precluded from any discovery by the District Court, including critical factual issues of injury and maternal health (App. 802-803, par. 4-7). Argument was made regarding the Defendants' Fed. R. Civ. P. 56(f) request; this request was ultimately rejected as the District Court granted summary judgment to the Plaintiffs and Plaintiff-Intervenor, which involved factual determinations of injury and maternal health. (App. 756-757, 773-778)

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[2] This section is a continuation of the Statement of Facts in the main brief.

[9] The documents referred to by Defendants involving Roe v. Operation Rescue, No. 88-5157 (E.D.Pa. 1988) were submitted to the District Court. Certain documents, Court rulings and transcripts of another similar case in Boston, Planned Parenthood, et al. v. Operation Rescue, et al., No. 88-2329-MA, which were not submitted to the District Court because of unavailability, are included in the appendix as persuasive authority for this Court to consider.[3]

[10] ARGUMENT

I.

The District Court Lacked Subject Matter Jurisdiction To Grant Plaintiffs Summary Judgment And Enter A Permanent Injunction

As set forth in the Statement of the Case, supra, on December 29, 1988 the Record in this action was certified by the Clerk of the United States District Court for the Southern District of New York and filed with the Clerk of the United States Court of Appeals for the Second Circuit in connection with the then pending four appeals assigned Docket Nos. 88-7873, 88-7915, 88-7969 and 88-9103.

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[3] Documents submitted to District Court at October 25, 1988 hearing: App. 664-668, Order of First Circuit of Appeals affirming denial of TRO by District Court and District Court's first bench ruling (Tauro, U.S.D.J.). Documents not submitted to District Court: Transcript of hearing preceding District Court's first bench ruling (App. 839-897); Motions, affidavits, and Order Endorsement "Denied" regarding plaintiffs renewed motion for injunctive relief (A. David Mazzone, U.S.D.J.) (App. 669-683); Second Transcript referred to in denial of plaintiffs' renewed motions (App. 669, 898-937.)

These appeals are from (1) an order granting plaintiffs preliminary injunctive relief, (2) a final order and judgment holding Defendants Terry and "Operation Rescue" in contempt and fining them $50,000; (3) a final order and judgment holding Defendants Terry and "Operation Rescue" jointly and severally liable to pay $19,141 in police overtime costs to the City of New York and (4) a final order and judgment jointly and severally against Defendants Terry and "Operation Rescue" and their counsel for fees and expenses under Fed. R. Civ. P. 37(a)(4).

[11] When the record was filed in this Court, the District Court was deprived of jurisdiction to take any action that substantially altered the status quo in the action as it then stood. Ryan v. United States Lines, 303 F.2d 430, 433-34 (2d Cir. 1962); Armstrong v. Board of Supervisors, 616 F.2d 305, 327 (7th Cir. 1980); Johnson v. Scully, 563 F. Supp. 851, 877 (E.D.N.Y. 1983), rev'd on other grounds, 727 F.2d 222 (2d Cir. 1984). Although the Defendants invoked the District Court's lack of subject matter jurisdiction, as the District Court acknowledged (App. 503, 505), the Court determined that it had jurisdiction to render a decision on the merits of Plaintiff's and the City's claims and grant final and permanent relief thereunder (App. 507). This result depended upon an impermissible reading of the relief sought in the complaints and ignored the fact that three appeals were pending from judgments unquestionably final in nature.[4]

When the court granted Plaintiffs' and the City's motion for summary judgment, it recast its earlier Opinion

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[4] For example, it is clear that the judgment against Defendants' counsel is a final judgment and appealable as such by the affected counsel. Reygo Pacific Corp. v. Johnston Pump Co., 680 F.2d 647, 648-649 (9th Cir. 1982).

multiple theories and case authorities advanced in the motion. It is [12] precisely this change in the posture of the record on appeal which is prohibited by Rule 4 of the Federal Rules of Appellate Procedure, even in the case of appeals from non-final orders. See International Association of Machinists & Aerospace Workers v. Eastern Airlines, Inc., 847 F.2d 1014, 1017-1018 (2d Cir. 1988); State of New York v. Nuclear Regulatory Commission, 550 F.2d 745, 758-59 (2d Cir. 1977); Ideal Toy Corp. v. Sayco Doll Corp., 302 F.2d 623, 625 (2d Cir. 1962); Landman v. Mitchell, 445 F.2d 274, 275 (5th Cir. 1971), cert. denied, 404 U.S. 1022 (1972).

II.

Granting Permanent Injunctive Relief To A Class Never Certified, Violated Rule 23

In its January 18, 1989 decision, the District Court concedes that "[t]o date, the court has taken no action to certify the putative class" (App. 496). However, on January 10, 1989 the Court issued a permanent injunction that applies by its express terms to "any facility at which abortions are performed in the City of New York, Nassau, Suffolk or Westchester counties" (App. 489-490). While the District Court had previously justified its failure to certify the class before granting temporary and preliminary injunctions on the ground of the alleged lack of time to address the appropriateness of [13] class treatment in advance of planned demonstrations (e.g., App. 474),[5] no such claimed "emergency" can even be offered to support the awarding of a permanent injunction to a still uncertified class. The authorities discussed at pages 43-45 of Defendants' Main Brief apply a fortiori to the January 10, 1989 permanent injunction.

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[5] The court never addressed the fact that the continual time pressure was a function of when Plaintiffs sought to invoke the court's equitable powers.

III.

The Court Erred In Granting Summary Judgment To Plaintiffs

Fed. R. Civ. P. 56(c) provides that summary judgment is appropriate,

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Here there were no depositions or answers to interrogatories, because Defendants were never permitted to take any discovery of Plaintiffs on their claims (App. 802-803, 756-757, 773-778) although they made a Fed. R. Civ. P. 56(f) request. Moreover, Defendants' opposing affidavits demonstrated that there were **[14]** material issues of fact on which discovery was necessary (see, e.g., App. 794-800). Finally, not only were Plaintiffs not entitled to judgment as a matter of law, but their pleadings should have been dismissed.

A. Plaintiffs Failed To Plead Or Prove A Claim Under Section 1985(3)

1. State Involvement.

The District Court herein found that to satisfy the claim that Defendants had conspired to deny Plaintiffs' Right to Privacy (abortion) under 42 U.S.C. Section 1985(3), there must be a showing of "state involvement." Subsumed in

this holding, is the fact that the Right of Privacy (abortion) is only constitutionally protected against government or state infringement, not private action. See Appellants Appeal Brief, p. 66.

The District Court opinion concludes that Rescue demonstrations have rendered "police officials incapable of securing women who choose abortion equal access to medical treatment," thus satisfying Section 1985(3)'s requirement for "state involvement." (App. 519-20) Overlooking a line of Supreme Court holdings concerning state action requirements, the Court supports its conclusion with dictum from Justice [15]Steven's concurring opinion in Great Am. Fed. Savings & Loan Ass'n v. Novotny, 442 U.S. 366, 384 (1979) (Stevens, J., concurring):

> [I]f private persons take conspiratorial action that prevents or hinders the constituted authorities of any State from giving or securing equal treatment, the private persons would cause those authorities to violate the Fourteenth Amendment; the private persons would then have violated § 1985(3).

In the paragraph immediately following the foregoing quotation, however, Justice Stevens describes the requisite nature of state action contemplated:

> If, however, private persons engage in purely private acts of discrimination -- for example, if they discriminate against women or against lawyers with a criminal practice, [citation omitted] -- they do not violate the Equal Protection Clause of the Fourteenth Amendment. The rights secured by the Equal Protection and Due Process Clause of the Fourteenth Amendment are rights to protection

> against unequal or unfair treatment by the State not by private parties). Thus, while §1985(3) does not require that a defendant act under color of state law, there still can be no claim for relief based on a violation of the Fourteenth Amendment if there has been no involvement by the State. The requirement of state action in this context is no more than a requirement that there be a constitutional violation.

442 U.S. 384-85 (emphasis added).

[16] Thus, in the Supreme Court's recent holding regarding state action in an alleged trade union conspiracy to deny First Amendment rights, the majority opinion similarly concluded that:

> [A]n alleged conspiracy to infringe First Amendment rights is not a violation of § 1985(3) unless it is proved that the State is involved in the conspiracy or that the aim of the conspiracy is to influence the activity of the State.

United Brotherhood of Carpenters & Joiners v. Scott, 463 U.S. 825, 830 (1983) (emphasis added).[6] With respect to the foregoing requirements, applied to the case at hand, it is clear from the record that there are no allegations and no evidence of any kind that the State was involved in any alleged conspiracy, or that the aim of the alleged conspiracy

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[6] In its opinion, the Court cites United Brotherhood of Carpenters & Joiners v. Scott, 463 U.S. at 840 n.2. as supportive of its holding, without noting its source as Blackmun, J., (dissenting) (App. 520).

was to influence State activity. Indeed, the Defendants' manifest purpose has been to directly intervene through Rescue demonstrations to save unborn human life.

It is accordingly evident, that the District Court's holding in this respect is erroneous. The Court's opinion that the police's alleged inability to secure "equal access" to [17] abortions for women constitutes "state involvement" for purposes of Section 1985(3), is in fact, analogous to the dissent's argument in Carpenters, that the State's failure to enforce or threatened failure to enforce the law is enough to trigger Section 1985(3). United Brotherhood of Carpenters & Joiners v. Scott, 463 U.S. 825, 851 (Blackmun, J., dissenting).

Beyond the Supreme Court's mandated "state action" requirements in the Carpenters decision, are earlier holdings, where the Court broadly describes the benchmarks of state involvement. In Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974), dealing with a private power company, closely regulated by the State, it was said: "But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." (emphasis added) And in Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961), citing the earlier decision of Shelley v. Kraemer, 334 U.S. 1 (1948), the Court observed, "that private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it." (emphasis added) [18] In the later case of Flagg Bros. v. Brooks, 436 U.S. 149, 164-166 (1978), dealing with a due process, equal protection challenge to a state statute permitting private warehousemen to sell levied goods in place of the sheriff's department, it was held that mere

acquiescence on the part of the State to private activity does not convert that activity into State action.

In light of the foregoing discussion, it is clear that the District Court's finding of "state involvement" for purposes of Section 1985(3) herein, is plainly incorrect and should be reversed.

2. Class-Based Animus.

In its summary judgment opinion, the District Court held: "a conspiracy to deprive women seeking abortions of their rights guaranteed by law is actionable under section 1985(3)." (Emphasis added) (App. 516-517). The defendants assert this holding is an unwarranted extension of Section 1985(3).

The concept of animus is one of ill-will. It is undisputed that "Operation Rescue" demonstrators seek to intervene to protect (1) the unborn child from imminent violent death and (2) the mother from the harmful effects of abortion. Dr. O'Callaghan testified that nearly 50% of her counselees suffer from an emotional and psychological disorder denominated **[19]** post-abortion stress syndrome. (App. 230-286, 255-259) It is simply wrong to suggest that the Defendants or Operation Rescue demonstrators have any ill-will or invidious discrimination toward women. Despite the District Court's comparison of Rescue demonstrations with the activities of the Klu Klux Klan (App. 517 at N.13),[7] it is undisputed that all Operation Rescue

---

[7] As the Fourth Circuit has stated, "The passage of the Klu Klux Klan Act was in response to widespread acts of violence and acts of terror directed at blacks and their supporters in the post-war South." Harrison v. KVAT Food Management, Inc., 766 F.2d

(continued...)

demonstrators are peaceful, prayerful and nonviolent. Demonstrators specifically must take a pledge of nonviolence, which is to be followed even if violence is committed against the demonstrators. (App. 606-607, 614-617, 794-800, 790-793)

The United States Supreme Court in United Broth. of Carpenters and Joiners v. Scott, 463 U.S. 825 (1983) specifically refused to affirm the Fifth Circuit Court of Appeals' holding that Section 1985(3) "reaches conspiracies other than those motivated by racial bias." Id. at 835.

[20] Even if gender bias is reachable, all women or women in general are not the appropriate class for the case at bar, despite the semantics of the District Court: a subgroup of women are -- pregnant women.

Pregnancy, however, is not an immutable characteristic common to all women at all times, as is race or gender. "The conspiracy, in other words, must aim at a deprivation of equal enjoyment of rights secured by the law to all." Scott at 835, quoting Griffin v. Breckenridge, 403 U.S. 88, 182 (1966) (emphasis added). See Doe v. Deane, 658 F.Supp. 216, 221-222 (W.D. Mich. 1987) (rejecting "surrogate mother" class); Harrison v. KVAT Food Management, Inc., 766 F.2d 155 (4th Cir. 1985) (limiting Section 1985(3) to racially-motivated bias); McLellan v.

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[7] (...continued)

155, 158 (4th Cir. 1985) (emphasis added); McLellan v. Mississippi Light & Power Co., 545 F.2d 919, 931 (5th Cir. 1977) ("the statute was enacted by a Congress predominantly concerned with the violent activity of a vindictive Klu Klux Klan") (emphasis added).

Violence, terror and vindictiveness are hardly an apt description of Operation Rescue demonstrations.

Mississippi Power & Light Co., 545 F.2d 919, 929 (5th Cir. 1977) (foreshadowed Scott's "close question" analysis concerning non-racial classes: "That concern dictates the exercise of restraint when a court is confronted with class-based discrimination grounded in a non-racial animus."); McLean v. International Harvester Co., 817 F. 2d. 1214, 1218-19 (5th Cir. 1987) (quoting McLellan at 928-929 regarding the exercise of restraint in recognizing non-racial class-based animus); Wilhelm v. Continental Title Co., 720 F.2d 1173, 1176-1177 (10th Cir. 1983), cert. denied, 104 S. Ct. 1601 [21] (1984) (Courts must give effect to the intent of the Congress of 1871, which was primarily interested in invidious racial discrimination); D'Amato v. Wisconsin Gas Co., 760 F.2d 1474, 1485-1487 (7th Cir. 1985), (Scott requires caution beyond racial class).

The Defendants urge that this Court reject a class made of a subgrouping of gender: pregnant women. There is no factual basis for a finding that the Defendants or Rescue demonstrators have ill-will, animus or invidious discrimination against pregnant women.

3. The Right to Travel.

Relying on a holding for Doe v. Bolton 410 U.S. 179, 200 (1973), that State residency requirements for abortions are inconsistent with the Privileges and Immunities Clause of the Fourth Amendment, together with a brief reference to the right against private discrimination created by the Supreme Court in Griffin v. Breckenridge, 403 U.S. 88, 105-06 (1971), the District Court opinion concludes that the Defendants' sit-in demonstrations have denied the Plaintiffs' Constitutional Right to Travel. (App. 518-19).

As a threshold matter, no Right to Travel case factually analogous to Rescue demonstrations exists. The majority [22] of Court holdings deal with State infringement of the Right to Travel, principally through discriminatory residency requirements. See e.g., Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).[8]

In Griffin v. Brekenridge, supra, certain whites had forcibly stopped an automobile containing "Negro" citizens on a public highway. One of the Negroes, mistakenly believed to be a Civil Rights worker, was beaten with a club, while the others were allegedly threatened with death and injury and then beaten themselves. Under this factual situation, after detailed analysis of the legislative history of § 1985(3), the Supreme Court found that the Right to Travel was subject to "private" interference as well as "governmental," and thus actionable under § 1985(3).

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[8] See also Comment, The Right to Travel: In Search Of a Constitutional Source, 55 Neb. L. Rev. 117 (1975); Note, The Right to Travel--Quest for a Constitutional Source, 6 Rut. Cam. L.J. 122 (1974).

Griffin v. Breckenridge, 403 U.S. 88, 98-106. Reversing the Fifth Circuit's affirmation of the District Court dismissal, the Supreme Court observed that it was "open to the petitioners to prove at trial that they had been engaging in interstate travel or intended to do so, that their federal right to travel was one of the rights meant to be [23] discriminatorily impaired by the conspiracy. . ." Id. at 106.

The District Court's holding herein, that the Defendants have violated Plaintiffs' Right to Travel is incorrect and unsupported in fact and law. A brief review of the Plaintiffs' claim that "Defendants' actions in blockading clinics" are "indistinguishable" from "the actions alleged in Griffin",[9] shows it to be unsubstantiated nonsense:

> - Griffin involved the act of forcibly blocking travel on a State highway. Rescues occur on public sidewalks in the traditional manner of peaceful Civil Rights sit-in demonstrations.
>
> - Griffin involved detention, the brutal use of deadly force and immediate threats of death and serious injury to halt travel upon a highway. Rescues constitute passive, non-violent demonstrations to stop the act of abortion at clinics and have nothing to do with free travel on public highways or streets.
>
> - Griffin involved racially, class based animus, proscribed by law. Rescue involve the intent to

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[9] Memorandum of Law in Opposition To Defendants Motion to Dismiss and In Support of Plaintiffs' Motion For Summary Judgment, dated December 21, 1988 at 26.

> non-violently halt abortion to protect unborn human life and the mother, which has not been proscribed for purposes of Section 1985(3).
>
> - Griffin involved violent, racially based assaults interfering with highway travel and Civil Rights activity. Rescues, involve peaceful First Amendment activity such as display of placards, singing, chanting, counseling and praying, as well as passively blocking the entrance of abortion [24] facilities as a means of protesting and halting the termination of unborn human life.

With respect to the question of racial animus, as related to Section 1985(3) actions, the Court in Griffin noted that "the conduct here alleged lies so close to the core of the coverage intended by Congress that it is hard to conceive of wholly private conduct that would come within the statue if this does not." Id. at 103. In the later case of United Brotherhood of Carpenters and Joiners v. Scott 463 U.S. 825, 836, dealing with alleged "political" and "economic" animus, the Court noted:

> We are unpersuaded. In the first place, it is a close question whether §1985(3) was intended to reach any class based animus other than animus against Negroes and those who championed their cause, most notably Republicans. The central theme of the bill's proponents was that the Klan and others were forcibly resisting efforts to emancipate Negroes and give them equal access to political power. The predominate purpose of §1985(3) was to combat the prevalent animus against Negroes and their supporters.

Griffin, in applying the interstate Right to Travel to the

context of §1985(3), dealt directly with violent, purposeful racial animus. No such animus exists in fact or analogously in this case. Indeed, the intent or Rescue demonstrations is the emancipation of human life.

[25] The contention that non-violent sit-in demonstrations involving hundreds of volunteers of conscience, gathering to halt abortion, rises to a purposeful constitutional violation of the interstate Right to Travel, is nothing short of constitutional fiction--legal ambrosia--the quest for a Federal cause of action where none exists.

It is respectfully submitted, that the District Court's finding that Plaintiffs' Right to Travel has been violated should accordingly be reversed.

B. Plaintiffs Failed To Plead
Or Prove A Claim For Trespass

As the District Court itself pointed out (App. 521), "[t]respass is the interference with a person's right to possession of real property . . . ." However, there is no evidence that any participant during an "Operation Rescue" demonstration in the New York Metropolitan Area entered upon the private property of any named Plaintiff or any other person or entity. All of the demonstrations took place on the public sidewalk in front of abortion facilities. Cf. People v. Bush, 39 N.Y.2d 529, 349 N.E.2d 832, 384 N.Y.S.2d 733 (1976). This aspect of "Operation Rescue's" planned activities was publicly announced and known to Plaintiffs and the District Court. Therefore, there is simply no factual predicate to sustain a claim of trespass. (App. 780-781).

[26] Moreover, in order to enjoin trespasses in New York they must be "repeated or continuous." Lyons v.

Ball, 133 N.Y.S.2d 392, 393 (Sup. Ct. Westchester Co. 1954). The reason for such a rule underlies all exercises of the equity powers of the Court:

> A court of equity will not act in anticipation of possible future controversies, which may never take place. A temporary injunction is granted only when the rights of a plaintiff are being presently threatened so that irreparable injury will result unless prompt, immediate relief is granted.

Pratt v. LaGuardia, 47 N.Y.S.2d 359, 365 (Sup. Ct. New York County, 1944) (emphasis added).

The Amended Complaint failed to allege how a hypothetical trespass of limited duration could possibly cause an abortion clinic irreparable harm. The record is devoid of any evidence that the Defendants had either injured persons or property in the past or that they intended to do so in this case. Although the District Court referred to "[d]amages to the target facility and to the women who attempt to use the facility" (App. 521), there was no hearing at which evidence of any such damages was offered. To the extent that a demonstration caused a temporary loss of income to an abortion facility, there was certainly an adequate remedy at law in money damages. [27] Indeed, accepting the allegation in the Amended Complaint that abortions are ordinarily done by appointment (para. 40), Plaintiffs could not even argue that damages would be difficult to calculate.

Even before passage of the class action statute, New York courts have permitted class actions which sought as an exclusive remedy injunctive relief against an on-going nuisance which affected all members of the class. Greer v. Smith, 155 App. Div. 420, 140 N.Y.S. 43 (2d Dep't

1913). However, as stated by the court in Fisher v. Health Insurance Plan of Greater New York, 324 N.Y.S.2d 732, 736 (Sup. Ct. Kings Co. 1971):

> Separate wrongs to separate persons, though committed by similar means and pursuant to a single plan, do not alone create a common or general interest in those wronged . . . [citations omitted]. Class actions may not be maintained when the asserted wrongs are individual to the different persons and each aggrieved person may determine for himself the remedy he will seek and may be subject to a defense not available to others . . . .

There is no doubt that in the controversial area of abortion emotions may run high, but as Judge Newman said in Sierra Club v. Mason, 365 F. Supp. 47, 50 (D. Conn. 1973):

> Injunctions do not issue to avoid "temptation" toward some allegedly wrongful conduct, United Transportation Union v. State of Michigan Bar, [28]supra, 401 U.S. at 583 nor 'to soothe the anxieties of the parties'. Humble Oil & Refining Co. v. Harang, 262 F. Supp. 39, 42 (E.D. La. 1966).

Where on the other side of the equation, fundamental First Amendment rights of free speech, assembly and petition are involved, a court simply cannot constitutionally impose prior restraints on individuals who have eschewed violence, to "soothe the anxieties" of operators of income producing abortion clinics, which clearly have an adequate remedy at law.

C. The City Failed to Plead Or Prove A Claim For Public Nuisance

The District Court held that the City "has pleaded and proved all the elements of its public nuisance claim" (App. 523). There is simply no basis in the record for this finding.

A public nuisance is an offense to the public of a neighborhood or community in the enjoyment of its common rights, as distinguished from activity which results merely in injury even to large numbers of persons in the enjoyment of private rights, not shared by members of the community or neighborhood at large. See generally Copart Industries v. Consolidated Edison Co., 41 N.Y.2d 564, 394 N.Y.S.2d 169, 362 N.E.2d 968 (1977); State v. Wright Hepburn Webster Gallery [29] Ltd., 664 Misc. 2d 423, 314 N.Y.S.2d 661 (Supp. Ct. N.Y. Co. 1970), aff'd, 37 A.D.2d 698, 323 N.Y.S.2d 389 (1st Dep't 1971); 42 N.Y. Jur., Nuisances § 5, p. 449.

In the instant case, the City has not alleged that there has been any interference with or disruption of the rights of a neighborhood or community in the enjoyment of its common rights. Rather, the complaint merely alleges that the proposed activity by "Operation Rescue" participants will interfere with or otherwise prejudice the ability of some women to have abortions at the clinics targeted by "Operation Rescue."

The claimed rights of these women are clearly private rights and are not shared by members of the neighborhoods or communities at large where "Operation Rescue" intends to demonstrate. In other words, we do not have in this action as Plaintiffs a cross section of the affected

neighborhoods clamoring for a stop to "Operation Rescue's" activities.

The Court's assertion that Defendants "have interfered with the public's right to obtain medical services, and have injured the health of a considerable number of persons" (App. 523) is entirely unsupported. Plaintiffs did not offer the testimony of a single woman who claims to have been denied **[30]** an abortion as a result of an "Operation Rescue" demonstration, let alone that she sustained any injury to her health therefrom. No discovery was permitted to Defendants before the District Court granted the City's motion for summary judgment, and no factual showing of injury to any woman was made by the City on its public nuisance claim.

Moreover, even if a significant number of women were shown to have been affected, this is not material and does not render "Operation Rescue's" activity a public nuisance. People v. Brooklyn & Queens Transit Corp., 258 App. Div. 753, 15 N.Y.S.2d 295 (2d Dept. 1939), aff'd, 283 N.Y. 484, 28 N.E.2d 925 (1940); State v. Waterloo Stock Car Raceway, Inc., 96 Misc. 2d 350, 409 N.Y.S.2d 40 (Sup. Ct. Sececa Co. 1978). There was absolutely no colorable basis for the District Court's grant of summary judgment to the City.

IV.

FIRST AMENDMENT

The First Amendment arguments made in Defendants' main brief, are even more vital as applied to the permanent injunction. The permanent injunction dramatically escalates the $25,000/day fines by adding a doubling provision, which the Plaintiffs, and Plaintiff-Intervenor City sought.

(App. 491). The District Court's geometric increase of the already [31] phenomenally large $25,000/day fines was apparently done without hesitation, as the District Court had previously characterized the $50,000 unconditional contempt fine as being "modest by any standard". (App. 759).

The District Court has consistently failed, despite its shibboleths, to engage in any meaningful First Amendment analysis with regard to the Rescue demonstrations, branding all of the Defendants' as "outlaws" and the Rescue demonstrations and protest activities as unlawful "hit and run tactics." (App. 758-759, 768; But see, U.S.D.J. Tauro, App. 860-861: demonstrations are First Amendment expression; U.S.D.J. Mazzone, App. 933-937: demonstrations not a riot or uncontrolled or unmanageable conduct; U.S.D.J. Newcomer, App. 690: announcement of demonstrations not illegal conduct).

The Defendants continue to assert the defense of justification because of their common purpose in defending unborn children and mothers. (App. 790-793, 584-637; See comments of Pennsylvania Chief Justice Robert C. Nix, Jr., at App. 612) Compare Commonwealth v. Markum, 541 A.2d 347, 354-356 (dissenting opinion of Tamila, J.).

[32]

V.

STANDING

The District Court correctly recognized that when standing is interposed to defeat summary judgment, the Plaintiffs must go beyond their pleadings to offer competent proof. (App. 509). The District Court, without citation to authority, held that the fact that the abortion provider Plaintiffs were potential targets of the demonstrations

supplied the "concrete threat of injury". Without allowing discovery by Defendants or requiring proof, the District Court found standing. The District Court engaged in no analysis as to the other non-provider Plaintiffs, but did not dismiss them.

The Defendants again submit that the "concrete threat" is none other than the First Amendment protected announcement of the demonstrations. By engaging in free speech, the Defendants supposedly confer standing on all Plaintiffs. The Defendants submit that this holding and rationale is erroneous.

CONCLUSION

It is respectfully submitted that the judgments and orders appealed from should be reversed.

Dated: New York, New York
February 14, 1989

Respectfully submitted,

A. LAWRENCE WASHBURN, JR.
80 Pine Street
NeW York, New York 12207
(212) 701-3524

MICHAEL P. TIERNEY
41 State Street, Suite 611
Albany, New York 10005

JOSEPH P. SECOLA
GEORGE J. MERCER
The Rutherford Institute of Connecticut
P.O. Box 3196
Milford, Connecticut 06460
(203) 874-9262

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IN THE

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OCTOBER TERM, 1993

REVEREND ROBERT PEARSON, ET AL.,
Petitioners,

- v. -

PLANNED PARENTHOOD MARGARET SANGER CLINIC (MANHATTAN), ET AL.,
Respondents.

REPLY BRIEF FOR PETITIONERS

MICHAEL P. TIERNEY
A. LAWRENCE WASHBURN, JR.
KARIN M. BURKE
Legal Center for Defense of Life
210 East 23rd Street, Suite 5F
New York, NY 10010
(212) 685-1360

JOSEPH P. SECOLA
(Counsel of Record)
McCarthy & Secola, P.C.
P.O. Box 1108
8 South Main Street
New Milford, CT 06776
(203) 355-0923

WILLIAM P. HARRINGTON
Bleakley Platt & Schmidt
One North Lexington Avenue
P.O. Box 5056
White Plains, NY 10602
(914) 949-2700

JOHN F. SWEENEY
GABRIEL P. KRALIK
Morgan & Finnegan
345 Park Avenue
New York, NY 10154
(212) 758-4800
Attorneys for Petitioners

WALTER T. CLARK, JR.
WALTER T. CLARK, III
MARY N. CLARK
Clark & Clark
271 North Avenue
New Rochelle, NY 10801
(914) 576-6500

TABLE OF CONTENTS

Page

ARGUMENT 1

I. THE QUESTIONS PRESENTED BY THE PETITIONERS ARE ON DIRECT REVIEW IN THIS COURT 1

A. The Issue Of Whether The Contempt Fines, Penalties, And Award Of Attorneys' Fees Are Civil Or Criminal In Nature Are Matters Of Direct Review 4

II. THE LAW OF THE CASE IS THIS COURT'S DECISION VACATING THE SECOND CIRCUIT'S AFFIRMATION OF THE DISTRICT COURT'S IMPOSITION OF CRIMINAL-TYPE SANCTIONS AND HOLDING APPLICABLE THE KU KLUX KLAN ACT TO PETITIONERS WITH ITS SECTION 1988 AWARD OF ATTORNEYS' FEES 7

A. Under This Court's Decision In Harper v. Virginia Dept. Of Taxation, The Bray Decision Must Be Given Full Retroactive Effect 9

CONCLUSION 10

TABLE OF CONTENTS cont'd

APPENDIX

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit Of Reverend Robert Pearson, Et Al., No. 92-282, Dated August 11, 1992

TABLE OF AUTHORITIES

Page(s)

CASES

Bray v. Alexandria Women's Health Clinic, 506 U.S. ____, 113 S. Ct. 753, 122 L. Ed. 2d 34 (1993) 2, 7, 9, 10

Cabot Corp. v. United States, 12 C.I.T. 664, 10 I.T.R.D. 1736, 694 F. Supp. 949 (Ct. Int'l Trade 1988) 5

Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988) 6

Federal Deposit Ins. Corp. v. Ramirez-Rivera, 869 F. 2d 624 (1st Cir.), *reh'g denied*, (1989) 8

Gertz v. Welch, 680 F. 2d 527 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226, 103 S. Ct. 1233, 75 L. Ed. 2d 467 (1983) 8

Harper v. Virginia Department of Taxation, ____ U.S. ____, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993) 9

TABLE OF AUTHORITIES cont'd

Page(s)

In re PCH Associates,
949 F.2d 585 (2d Cir. 1991) 5

In re Sanford Fork & Tool Co.,
160 U.S. 247, 16 S. Ct. 291,
40 L. Ed. 414 (1895) 8

International Union, United Mine Workers of America v. Bagwell,
____ U.S. ____,
113 S. Ct. 2439, 124 L.
Ed. 2d 657 (1993) 3, 4, 10

New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339
(2d Cir. 1989),
cert. denied, 495 U.S. 947
(1990) 1, 4, 6, 7, 9

New York State Nat'l Org. for Women v. Terry, 961 F. 2d 390
(2d Cir. 1992) 2, 6, 7, 9

New York State Nat'l Org. for Women v. Terry, 996 F.2d 1351 (2d Cir. 1993) 3

NLRB v. United Technologies Corp.,
706 F.2d 1254 (2d Cir. 1983) 5

TABLE OF AUTHORITIES cont'd

Page(s)

Pearson v. Planned Parenthood Margaret Sanger Clinic, 113 S. Ct. 1233, 122 L. Ed. 2d 640 (1993) 2-4, 6, 7, 9, 10

Southern Ry. Co. v. Clift, 260 U.S. 316, 43 S. Ct. 126, 67 L. Ed. 283 (1922) 5

United States v. Bulculfine, 527 F.2d 941 (1st Cir. 1975) 8

United States v. Rivera-Martinez, 931 F. 2d 148 (1st Cir.), *cert. denied*, 112 S. Ct. 184, 116 L. Ed. 2d 145 (1991) 8

United States v. United States Smelting, Refining and Mining Co., 339 U.S. 186, 70 S. Ct. 537, 94 L. Ed. 750, *reh'g denied*, 339 U.S. 972, 70 S. Ct. 994, 94 L. Ed. 1379 (1950) 5, 6

Vendo Co. v. Lektro-Vend Corp., 434 U.S. 425, 98 S. Ct. 702, 54 L. Ed. 2d 659 (1978) 8

TABLE OF AUTHORITIES cont'd

Page(s)

RULES AND STATUTES

28 U.S.C. § 1254(1) 6

42 U.S.C. § 1985(3) 2

42 U.S.C. § 1988 . . . . . 1-3, 6, 7, 10

Rule 10(c) of the Supreme
Court of the United States (1990) 4

OTHER AUTHORITIES

1B J. Moore, J. Lucas & T. Currier,
Moore's Federal Practice,
¶ 0.404 [1] (1993) 8

18 C. Wright and A. Miller,
Federal Practice and Procedure
§§ 4416, 4419, 4420 and 4478 (1993) 5, 6

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Respondents.

REPLY BRIEF FOR PETITIONERS

Petitioners Reverend Robert Pearson, et al., herein reply to the arguments raised in the Respondents Brief in Opposition.

ARGUMENT

I. THE QUESTIONS PRESENTED BY THE PETITIONERS ARE ON DIRECT REVIEW IN THIS COURT

In an effort to create confusion, the Respondents inartfully raise the doctrine of res judicata in an attempt to dissuade this Court from considering the questions presented in the instant petition for certiorari.

Petitioners seek relief from various final judgments of the district court (all of which were adjudicated post-*Terry* I[1]) assessing *inter alia* (1) 42 U.S.C. § 1988 attorneys' fees on the

[1] *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990).

main case of $157,505.81;[2] (2) $83,009.69 contempt attorneys' fees[3] and contempt fines totalling $375,000.[4] These district court judgments were affirmed in *Terry II*, 961 F. 2d 390 (2d Cir. 1992) (See, Pet. for Cert. App. D: A-8 to A-37). All of these judgments are properly on direct review in this court in the instant petition for certiorari.

Under Docket No. 92-282 in this Court, filed on August 11, 1992 Petitioners filed the *Pearson I* petition for writ of certiorari to the Second Circuit. (The *Pearson I* petition is reproduced in the Appendix to this Reply Brief). The issues raised in that petition (and throughout all prior proceedings) involved the applicability of 42 U.S.C. § 1985(3) (hereinafter referred to as the Ku Klux Klan Act) to abortion protesters, 42 U.S.C. § 1988 attorneys' fees (see, Questions Presented I, II, III) and whether the enormous fines levied against Petitioners were civil or criminal in nature (see, Question Presented No. V).

The legal issues regarding 42 U.S.C. sections 1985(3) and 1988 were identical to those presented in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. ____, 113 S. Ct. 753, 122 L. Ed. 2d 34 (1993) which was decided on January 13, 1993. That decision held that the Ku Klux Klan Act did not apply to anti-abortion protestors and vacated the *Bray* respondents' section 1988 award of attorneys' fees. Accordingly, on February 22, 1993, this Court granted the *Pearson I* petition for certiorari and vacated the *Terry II* judgment of the Second Circuit, remanding

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[2] See, *New York State Nat'l Org. for Women v. Terry*, 961 F. 2d 390, 395 (2d Cir. 1992) (Pet. for Cert. Appendix D, at A-18) (hereinafter "*Terry II*"), *cert. granted and judgment vacated sub nom. Pearson v. Planned Parenthood Margaret Sanger Clinic*, 113 S. Ct. 1233, 122 L. Ed. 2d 640 (1993) (hereinafter "*Pearson I*").

[3] See, *Terry II*, 961 F. 2d at 395 (Pet. for Cert. App. at A-18).

[4] See, Petition for Cert. at 8 listing the specific contempt fines.

it to the Second Circuit for reconsideration, in the light of *Bray, sub nom. Pearson v. Planned Parenthood Margaret Sanger Clinic*, ____ U.S. ____, 113 S. Ct. 1233, 122 L. Ed. 2d 640 (1993) (see, Pet. for Cert. App. C: A-7).

Inexplicably, on July 2, 1993, the Second Circuit, ignoring the mandate of this Court, re-instated without modification the judgment which this Court had vacated, and suggested that the matter be sent back to the district court.[5] See, Per Curiam decision, *New York State Nat'l Org. for Women v. Terry*, 996 F.2d 1351 (2d Cir. 1993) (see, Pet. for Cert. App. B: A-3 to A-6).

No reasons were given for this apparent defiance of this Court's mandate.

Prior to the Second Circuit's failure to follow the mandate of this Court by re-instating the judgment which this Court had vacated on February 22, 1993, this Court granted certiorari in the case of *International Union, United Mine Workers of America v. Bagwell*, ____ U.S. ____, 113 S. Ct. 2439, 124 L. Ed. 2d 657 (1993) on June 1, 1993, (Docket No. 92-1625, hereinafter "*Bagwell*"). *Bagwell* raises issues regarding the nature of criminal and civil contempt which are identical to those raised by Petitioners herein (see, instant Pet. for Cert. at pp. 9-14). Lest there be any doubt as to whether these issues are identical, the *Bagwell* petition, at pages 17 and 18, cites what it describes as a "dangerous" line of cases involving anti-abortion protestors which have effectively ended the requirements for criminal due process in civil disobedience cases merely by characterizing punitive sanctions as "civil".

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[5] By reinstating the judgments, the Second Circuit made recourse to the district court futile as to those final judgments: $157,505.81 for § 1988 attorneys' fees on the main case; $83,009.69 in contempt attorneys' fees and $375,000 in contempt fines.

This, indeed, is a dangerous turn in our jurisprudence, reminiscent of the former Soviet Union where political dissidents were committed civilly to mental hospitals rather than afforded the modicum of due process guaranteed in the Soviet Constitution for criminal cases. Accordingly, the instant case and *Bagwell* raise issues which go far beyond the abortion controversy, namely the extent to which a free society will allow civil disobedience, in the tradition of the Abolitionists, of the Labor Movement, of Mohandas K. Gandhi, of Martin Luther King, Jr., and of the anti-Vietnam War protesters to be crushed without due process merely by characterizing the mechanism of suppression as "civil".

Accordingly, this Court should review this case pursuant to the standards set forth in its Rule 10(c) and either vacate and reverse the alleged civil contempt judgments, fines and penalties, and the awards of attorneys' fees, or vacate and remand for further proceedings consistent with the decision in *Bagwell* and this Court's prior order in this case in *Pearson I* (see, Pet. for Cert. App. C: A-7).

A. The Issue Of Whether The Contempt Fines, Penalties, And Award Of Attorneys' Fees Are Civil Or Criminal In Nature Are Matters Of Direct Review

Essentially, Respondents argue that all issues raised by Petitioners were previously decided in *Terry I*: these matters are therefore "res judicata", not subject to "collateral attack" or "direct review". "Important considerations of finality" preclude "reconsideration" "regardless of the merits". Respondents' Brief in Opposition, passim.

These technical words of art are nowhere defined by Respondents; they wrongfully assume to be true the very points they must prove.

However, specific definitions are necessary for the legal concepts known generically as res judicata (literally, a matter having been judged, from judicata, past passive participle of judicare, to judge) and known specifically as claim preclusion, collateral estoppel (or issue preclusion) and law of the case.

Res judicata contemplates a final judgment on the merits between the parties and is an absolute bar to further litigation. *Cabot Corp. v. United States*, 12 C.I.T. 664, 10 I.T.R.D. 1736, 694 F. Supp. 949, 954, n.2 (Ct. Int'l Trade 1988); cf. *NLRB v. United Technologies Corp.*, 706 F.2d 1254, 1259 (2d Cir. 1983). It is a matter of compulsion, not discretion (as are issue preclusion and law of the case). *Southern Ry. Co. v. Clift*, 260 U.S. 316, 43 S. Ct. 126, 67 L. Ed. 283 (1922). Res judicata and collateral estoppel contemplate the existence of a final judgment by the highest Court to have considered the case. *In re PCH Associates*, 949 F.2d 585, 593 (2d Cir. 1991). The issue must have been "both actually litigated and actually decided." 18 C. Wright and A. Miller, *Federal Practice and Procedure* § 4419 at 177; § 4420 at 182 (1993) (hereinafter "*Federal Practice And Procedure*").

By comparison, issue preclusion or collateral estoppel contemplates a separate lawsuit involving identical issues previously determined on the merits. 18 *Federal Practice and Procedure* § 4416 at 137-38.

A fortiori, if a matter in dispute is law of the case it cannot be res judicata or collateral estoppel. This is so because both claim and issue preclusion can arise only when a matter has been fully litigated. As long as it is *in fieri* as opposed to *judicata*, claim and issue preclusion can not arise. Cf. *United States v. United States Smelting, Refining and Mining Co.*, 339 U.S. 186, 198, 70 S. Ct. 537, 544, 94 L. Ed. 750, *reh'g denied*, 339 U.S. 972, 70 S. Ct. 994, 94 L. Ed. 1379 (1950).

Therefore, neither claim nor issue preclusion can be applicable in these proceedings since they are ongoing (*in fieri*), not finally decided (*judicata*). Cf. *United States et al. v. United States Smelting, Refining and Mining Corp.*, *supra* at page 198. That the decision in the Second Circuit which the Respondents erroneously describe as res judicata is actually law of the case is proven by the fact that the Second Circuit itself characterized its reasons for not reconsidering the district court's contempt and attorneys' fees judgments as its prior rulings on these issues in *Terry I*, which was law of the case. *Terry II*, 961 F.2d at 395-396 (1992) (see, Pet. for Cert. App. D: A-19 to A-20). Therefore, since it was only adhering to its previous decision in *Terry I*, the Second Circuit felt no need to change its ruling "at least at this juncture of the litigation". *Terry II*, 961 F.2d at 396 (see, Pet. for Cert. App. D: A-20).

By comparison, this Court has full power to review the Second Circuit by virtue of 28 U.S.C. § 1254(1) as indicated by *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988). So long as a matter is properly preserved in a lower Court (in this case, the civil v. criminal nature of the sanctions, applicability of the Ku Klux Klan Act, and the Section 1988 award of attorneys' fees) the fact that the lower Court can properly refuse consideration of matters of law of the case (as the Second Circuit did in *Terry II*) of course does not prevent subsequent review and reversal on appeal. 18 *Federal Practice and Procedure* § 4478 at 801; c*f. Christianson*, 486 U.S. at 817 ("a petition for certiorari can expose the entire case to review").

And this of course is precisely what happened on February 22, 1993: the judgement of the Second Circuit which it had based on the law of the case was vacated in *Pearson I*. Therefore, Respondents' claim that res judicata precludes reconsideration by this Court is without merit.

II. THE LAW OF THE CASE IS THIS COURT'S DECISION VACATING THE SECOND CIRCUIT'S AFFIRMATION OF THE DISTRICT COURT'S IMPOSITION OF CRIMINAL-TYPE SANCTIONS AND HOLDING APPLICABLE THE KU KLUX KLAN ACT TO PETITIONERS WITH ITS SECTION 1988 AWARD OF ATTORNEYS' FEES

In *Pearson I*, Petitioners requested this Court to grant certiorari to the Second Circuit. (The Petition is reproduced in the Appendix to the Reply Brief). They sought review of the Second Circuit's decision in *Terry II* reported at 961 F. 2d 390 (2d Cir. 1992). A previous petition for certiorari had been denied by this Court, not on the merits or because *Terry I* was somehow res judicata as respondents erroneously argue, but because the Second Circuit had not yet decided *Terry II*.[6] Following the Second Circuit's decision in *Terry II*, Petitioners again sought certiorari, which was granted after this Court's decision in *Bray*; the Second Circuit's judgment was vacated by this Court in *Pearson I*.

The Second Circuit had based its decision in *Terry II* on the doctrine of law of the case which required it to adhere to its prior decision in *Terry I*. *Terry II*, 961 F.2d at 396 (see, Pet. for Cert. App. D: A-20). However, the Second Circuit's judgment in *Terry II* was itself vacated and remanded by this Court.

---

[6] That petition for certiorari was denied by this Court as premature. This Court's order stated: "No. 91-875 *Florence Talluto, et al., Petitioners v. Planned Parenthood Margaret Sanger Clinic (Manhattan) et al.*, January 21, 1992. The petition for writ of certiorari to the United States Court of Appeals for the Second Circuit *before judgment* is denied." ____ U.S. ____, 112 S. Ct. 957, 117 L. Ed. 2d. 124 (1992) (emphasis added).

As Professor Moore puts it:

> When a case is appealed and remanded, the decision of the appellate court establishes the law of the case, which *must* be followed by the trial court on remand. If there is an appeal from the judgment entered after remand, the decision on the first appeal establishes the law of the case to be followed on the second.

1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice*, ¶ 0.404 [1], at II-3 (1993) (emphasis in original).

It follows that "when a case is decided by a appellate court and remanded --- any questions that were before the appellate court and disposed of by its decree become the law of the case and bind the district court on remand". *United States v. Bulculfine*, 527 F.2d 941, 943 (1st Cir. 1975); accord, *Federal Deposit Ins. Corp. v. Ramirez-Rivera*, 869 F. 2d 624 (1st Cir.), *reh'g denied*, (1989); cf. *United States v. Rivera-Martinez*, 931 F. 2d 148, 150 (1st Cir.), *cert. denied*, 112 S. Ct. 184, 116 L. Ed. 2d 145 (1991).

As this Court explained in *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 427-428, 98 S. Ct. 702, 703-704 (1978):

> '[w]hen a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case; and must carry it into execution according to the mandate.'

(quoting *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255, 16 S. Ct. 291, 293, 40 L. Ed. 414 (1895)); cf. *Gertz v. Welch*, 680

F. 2d 527, 532 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226, 103 S. Ct. 1233, 75 L. Ed. 2d 467 (1983).

Accordingly, the mandate of this Court in *Pearson I*, vacating the Second Circuit's judgment in *Terry II*, became the law of the case in all subsequent proceedings in inferior Courts, including the Second Circuit. Respondents' contention that *Terry I* controls the instant petition for certiorari is fallacious.

A. Under This Court's Decision In Harper v. Virginia Dept. Of Taxation, The Bray Decision Must Be Given Full Retroactive Effect

In *Bray v. Alexandria Women's Health Clinic*, *supra*, this Court held that the Ku Klux Klan Act did not cover anti-abortion protesters and vacated the award of section 1988 attorneys' fees based thereon. In turn, this Court in *Pearson I* vacated the judgment and remanded to the Second Circuit for reconsideration in light of *Bray*.

The most recent pronouncement of this Court on the subject of retroactivity is *Harper v. Virginia Department of Taxation*, ____ U.S. ____, 113 S. Ct. 2510, 125 L. Ed. 2d 74, 86 (1993).

The operative language of this Court is as follows:

> When this Court applies a rule, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open in direct review and as to all events, regardless of whether such events predate or postdate our announcement of this rule.

Accordingly, *Bray* must be given full retroactive effect and the award of Section 1988 attorneys' fees on the main case, based on the Second Circuit's erroneous conclusion that the Ku Klux Klan Act is applicable to anti-abortion protesters, must be vacated.

CONCLUSION

Certiorari should be granted to Petitioners and the decision of the Second Circuit re-instating the judgment previously vacated by this Court should either be vacated and reversed in light of this Court's rulings in *Bagwell* and *Pearson I* (based on *Bray*), or vacated and remanded for further consideration in light of the *Bagwell, Pearson I* and *Bray* decisions.

Dated: New Milford, CT.
March 11, 1994

Respectfully submitted,

JOSEPH P. SECOLA
(Counsel of Record)
McCarthy & Secola, P.C.
P.O. Box 1108
8 South Main Street
New Milford, CT 06776
(203) 355-0923

MICHAEL P. TIERNEY
A. LAWRENCE WASHBURN, JR.
KARIN M. BURKE
Legal Center for Defense of Life
210 East 23rd Street, Suite 5F
New York, NY 10010
(212) 685-1360

JOHN F. SWEENEY
GABRIEL P. KRALIK
Morgan & Finnegan
345 Park Avenue
New York, NY 10154
(212) 758-4800

WILLIAM P. HARRINGTON
Bleakley Platt & Schmidt
One North Lexington Avenue
P.O. Box 5056
White Plains, NY 10602
(914) 949-2700

WALTER T. CLARK, JR.
WALTER T. CLARK, III
MARY N. CLARK
Clark & Clark
271 North Avenue
New Rochelle, NY 10801
(914) 576-6500

Attorneys for Petitioners

APPENDIX

No. 92-282

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

REVEREND ROBERT PEARSON, ET AL.,
Petitioners,

- v. -

PLANNED PARENTHOOD MARGARET SANGER CLINIC (MANHATTAN), ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MICHAEL P. TIERNEY
A. LAWRENCE WASHBURN, JR.
Legal Center for the
Defense of Life
286 Fifth Avenue,
Suite 707
New York, NY 10001
(212) 695-1955

JOSEPH P. SECOLA
(Counsel of Record)
The Rutherford Institute
of Connecticut
P.O. Box 1108
8 South Main Street
New Milford, CT 06776
(203) 355-0923
Attorneys for Petitioners

QUESTIONS PRESENTED

I. Do "women seeking abortions" constitute a valid class for purposes of "class animus" requirement of 42 U.S.C. section 1985(3)?

II. Is opposition to abortion *per se* discrimination against women for purposes of "class animus" requirement of 42 U.S.C. section 1985(3)?

III. Do purely private actors who hinder access to an abortion facility violate a federal constitutional right to interstate travel merely because some patrons of the facility come from out of state?

IV. Are Respondents' claims under 42 U.S.C. section 1985(3) so insubstantial as to deprive the federal courts of subject matter jurisdiction?

V. Are the phenomenally large and unconditional contempt fines levied against the petitioners for participating in sit-in demonstrations (from $25,000 to $100,000, totalling $375,000) criminal in character, thus requiring application of criminal due process protections?

PARTIES

The Petitioners are as follows: Reverend Robert Pearson, Reverend Jesse Lee, Joseph Foreman, Michael McMonagle, Jeff White, Christopher Slattery, B.O.R.N. Randall A. Terry, and Thomas Herlihy, & Operation Rescue.

The Petitioners were defendants and non-party contempt respondents in the district court and appellants in the court of appeals. The following were defendants in the district court and were appellants in the court of appeals but are not presently Petitioners: Adele Nathanson, Florence Talluto and Michael LaPenna. Contempt was not sought against defendant Reverend James P. Lisante.

The Respondents are as follows: Planned Parenthood Margaret Sanger Clinic (Manhattan); New York State National Organization for Women; New York State Chapter of the National Organization for Women; National Organization for Women; Religious Coalition for Abortion Rights-New York Metropolitan Area; New York State National Abortion Rights Action League, Inc.; Planned Parenthood of New York City, Inc.; Eastern Women's Center, Inc.; Planned Parenthood Clinic (Bronx); Planned Parenthood Clinic (Brooklyn); Ob-Gyn Pavilion; The Center for Reproductive and Sexual Heath; VIP Medical Associates; Bill Baird Institute (Suffolk); Bill Baird Institute (Nassau); Dr. Thomas J. Mullin, Bill Baird; Reverend Beatrice Blair; Rabbi Dennis Math; Reverend Donald Morlan and Pro Choice Coalition. The Respondents were each plaintiffs in the district court and appellees in the court of appeals.

An Intervenor in the district court was the Respondent City of New York, which pressed a state law public nuisance claim. The City of New York did not seek contempt citations against either the defendants or non-party Petitioners in the proceedings at issue in the courts below. The United States was a judgment

creditor (by virtue of the contempt fines) in the district court a creditor-appellee in the court of appeals.

Petitioners B.O.R.N. and Operation Rescue are not a corporations under Rule 28.1 of the Rules of this Court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

DECISIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

A. Course of Proceedings 4

B. Statement of Facts 5

REASONS FOR GRANTING THE WRIT 8

I. The underlying injunctive orders of the district court enforced by purportedly civil contempt fines and penalties rest on the identical legal grounds at issue in a case presently before this Court, *Jane Bray et al. v. Alexandria Women's Health Clinic, et al.*, No. 90-985 8

A. Federal Jurisdiction 8

B. The Right to Interstate Travel 11

C. **Class Animus** 13

TABLE OF CONTENTS (cont'd)

II. The Second Circuit Erroneously Held That The Contempt Fines Imposed by The District Court Were Civil in Nature 15

CONCLUSION 19

APPENDICES

Appendix A: Opinion of U.S. Court of Appeals for the Second Circuit, April 13, 1992, 961 F.2d 390 (2d Cir. 1992) A - 1

Appendix B: Temporary Restraining Order dated May 5, 1988 A - 28

Appendix C: Preliminary Injunction dated October 27, 1988 A - 32

Appendix D: Permanent Injunction dated January 10, 1989 A - 36

Appendix E: Opinion of U.S. District Court for the Southern District of New York, February 27, 1990, 732 F.Supp. 400 (S.D.N.Y. 1990) A - 40

Appendix F: Order assessing contempt fines against Petitioners, May 10, 1990 A - 92

TABLE OF CONTENTS (cont'd)

Appendix G:	Oral Bench Ruling of the U.S. District Court for the Southern District of New York, November 8, 1990	A - 95
Appendix H:	Order assessing contempt fines against Petitioner Christopher Slattery, November 8, 1990	A - 108

TABLE OF AUTHORITIES

CASES:

Attorney General of New York v. Soto-Lopes, 476 U.S. 898 (1986) 12

Bray v. Alexandria Women's Health Clinic, *cert. granted*, ____ U.S. ____, 111 S.Ct. 1070, 112 L.Ed. 2d 1176 (1991) (No. 90-985) . . . . passim

Califano v. Gautier Torres, 435 U.S. 1 (1978) 12

Crozer-Chester Medical Center v. Moran, 560 A.2d 133 (Pa. 1989) 19

Douglas v. First National Realty Corp., 543 F.2d 894 (D.C. Cir. 1971) 19

Doyle v. London Guarantee & Acc. Co., 204 U.S. 599, 51 L.Ed. 641, 644 . . . . . 16, 18

Dunn v. Blumstein, 405 U.S. 330 (1972) 12

Falstaff v. Miller, 702 F.2d 770 (9th Cir. 1983) 19

Gompers v. Buck's Stove & Range, 221 U.S. 418 (1911) 16

Griffin v. Breckenridge, 403 U.S. 88 (1971) 11

Hicks v. Feiock, 485 U.S. 624 (1988) 15, 16, 18

In Re Merchants' Stock & Grain, 223 U.S. 639, 32 S.Ct. 339, 546 L.Ed. 584 (1912) 17

TABLE OF AUTHORITIES (cont'd)

CASES: Page(s)

In re Stewart, 571 F.2d 958 (5th Cir. 1978) 19

Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) 12

Michaelson v. United States, 266 U.S. 42 (1924) 18

National Abortion Federation v. Operation Rescue, No. CV- 89-1181 (AWT) slip op. at 7 (C.D. Cal. January 31, 1990) 12, 14

New York State Nat. Org. for Women v. Terry, 704 F. Supp. 1247 (S.D.N.Y. 1989) 4

New York State Nat. Org. for Women v. Terry, 886 F.2d 1339 (2d Cir. 1989), *cert denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed. 2d 532 (1990) 4, 6, 16, 18

New York State Nat. Organization for Women v. Terry, 732 F. Supp. 400 (S.D.N.Y. 1990) . . passim

New York State Nat. Org. for Women v. Terry, 961 F.2d 390 (2d Cir. 1992) . . . . . passim

Nye v. United States, 313 U.S. 33 (1941) 16, 18

Penfield v. Securities & Exchange Commission, 330 U.S. 585 (1947) 16, 18

Re Christian Engineering Co., 194 U.S. 458, 24 S.Ct. 729, 47 L.Ed. 1072 (1903) . . . 16, 17

TABLE OF AUTHORITIES (cont'd)

CASES: Page(s)

Shapiro v. Thompson, 394 U.S. 618 (1969) 12

Shillitani v. United States, 384 U.S. 364 (1966) 18

Thornburgh v. American Coll. of Obst. & Gyn, 476 U.S. 747 (1986) 19

U.S. Catholic Conf. v. Abortion Rights, 487 U.S. 72, 101 L.Ed. 2d 69 (1988) 9, 11

Union Tool v. Wilson, 259 U.S. 107 (1922) 16, 17

United Broth. of Carpenters and Joiners, Local 610 v. Scott, 463 U.S. 825 (1983) 11

United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892 (1989) 15

United States v. Miller, 540 F.2d 1213 (4th Cir. 1976) 19

United States v. North, 621 F.2d 1255 (3rd Cir. 1980) 19

United States v. Spectro Foods, 544 F.2d 1175 (3rd Cir. 1976) 19

United States v. United Mine Workers, 330 U.S. 258 (1947) 9-11

Young v. U.S. Ex Rel. Vuitton Et Fils S.A., 481 U.S. 787 (1987) 15

TABLE OF AUTHORITIES (cont'd)

CASES: Page(s)

STATUTES:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 4

28 U.S.C. § 1343 4

42 U.S.C. § 1985(3) 2, 4, 8, 11, 14, 15

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992
NO. 92-282

Reverend Robert Pearson, et al.,

Petitioners

v.

Planned Parenthood Margaret Sanger Clinic (Manhattan), et al.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DECISIONS BELOW

The two decisions of the district court resulting in two contempt judgments (Appendix F: A-92 to A-94 and Appendix H: A-108 to A-109) are reported in *New York State Nat. Organization for Women v. Terry*, 732 F. Supp. 400 (S.D.N.Y. 1990) (Appendix E: A-40 to A-91) and an unreported oral bench ruling which incorporates the first ruling (Appendix G: A-95 to A-107). The three underlying injunctive orders are included in the Appendix (A-28 to A-39). The appeals from these judgments were consolidated in the court of appeals. The

decision of the court of appeals was issued on April 13, 1992, and is reported at 961 F.2d 390 (2d Cir. 1992) (A1-A27).

JURISDICTION

The judgments of the district court for the Southern District of New York were entered on May 10, 1990 and November 8, 1990. The consolidated appeals involving the contempt fines in the United States Court of Appeals for the Second Circuit were decided on April 13, 1992. This Court has jurisdiction, under 28 U.S.C. section 1254(1) to review the judgment of the United States Court of Appeals. An order was issued by Associate Justice Clarence Thomas, Application No. A-10, on July 6, 1992, extending the time for filing this petition to and including August 11, 1992.

STATUTORY PROVISIONS

42 U.S.C. section 1985(3) provides as follows:

> If two or more persons in any State or Territory conspire to go in disguise on the highway or on the premises of another, for the purposes of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purposes of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified

person as an elector for President or Vice President, or as a Member of Congress of the United States or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section; if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

Petitioners are eight individuals and two organizations, personally and morally opposed to abortion who, as participants in peaceful and non-violent public demonstrations, were made subject to severe and coercive civil contempt fines totalling $375,000 for alleged violations of the three injunctions.[1]

These phenomenally large fines levied against anti-establishment political protesters, for their participation in anti-abortion rescue demonstrations which have been found by the

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[1] The district court issued three injunctions upon which the contempt fines and penalties are based: a temporary restraining order dated May 5, 1988 (Appendix B: A-28 to A-31), a preliminary injunction dated October 27, 1988 (Appendix C: A-32 to A-35) and a permanent injunction dated January 10, 1989 (Appendix D: A-36 to A-39).

Second Circuit to be "a form of political speech,"[2] are a means of repressing civil protest that would have been enthusiastically endorsed by Bull Connor and the Jim Crow South.

Respondents have asserted two federal causes of action: First, a conspiracy to violate a right to travel under 42 U.S.C. section 1985(3); and second, a conspiracy to violate a privacy right to abortion, also under Section 1985(3). Respondents also asserted various pendant state causes of action including trespass. Intervenor Respondent City of New York asserted a public nuisance claim under state law and no federal claim. Federal jurisdiction in the district court was invoked under 28 U.S.C. sections 1331 and 1343.

A. Course of Proceedings

The district court had earlier issued a permanent injunction (A-36 to A-39) in this action.[3] Subsequently, the private Respondents brought orders to show cause for summary judgment of contempt against the defendants and various non-party Petitioners for participating in Operation Rescue demonstrations on May 6, 1988, October 29, 1988, January 13, 1989 and January 14, 1989, in alleged violation of the temporary

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2 *New York State Nat. Org. for Women v. Terry*, 886 F.2d 1339, 1363 (2d Cir. 1989), *cert denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed. 2d 532 (1990).

3 *New York State Nat. Org. for Women v. Terry*, 704 F. Supp. 1247 (S.D.N.Y. 1989) (granting a permanent injunction prohibiting the blocking of access to facilities that perform abortion), *aff'd as mod., New York State Nat. Org. for Women v. Terry*, 886 F. 2d 1339 (2d Cir. 1989) *cert. denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed. 2d 532 (1990) (affirming the district court's various underlying injunctive orders in the original action as modified to provide that previous contempt fines against plaintiffs Terry and Operation Rescue were to be paid into the court, not to the plaintiff National Organization for Women).

restraining order, preliminary injunction and permanent injunction.

The district court adjudged the Petitioners in contempt of its orders and levied fines purportedly for civil contempt totalling $375,000 and attorney's fees. The appeal of these huge fines and attorneys' fees was argued before the court of appeals for the Second Circuit on May 20, 1991, and decided on April 13, 1992.

B. Statement of Facts

The Petitioners in this case were defendants or non-parties whom the district court held in contempt and against whom $375,000 in contempt fines were assessed payable to the United States. *See*, Judgments at Appendices F, H (A-92 to A-94 and A-108 to A-109).

The district court acknowledged that the Petitioners had attacked the underlying injunctive orders in the contempt proceeding for lack of subject matter jurisdiction. 732 F. Supp at 400. (A-57). This attack was rejected by the district court (A-58) and the court of appeals, 961 F.2d at 396 (A-11 to A-14), which relied upon the earlier Second Circuit decision in *New York State Nat. Org. for Women v. Terry, supra*. Judge Sneed, visiting from the Ninth Circuit, noted in his terse concurring opinion that he joined in upholding subject matter jurisdiction only because of the strong views of the Second Circuit. 961 F.2d at 400 (A-23).

The district court found that the demonstrations in which the Petitioners participated had been organized by defendant Operation Rescue so that "protestors each day would converge on a facility where abortions were performed in an effort to close down the facility [and] . . . their purpose was to block the

doors so they cannot do abortions today". 732 F. Supp. at 393 (A-43), 405 (A-71).

In the earlier Second Circuit opinion, the circuit court recognized that the "defendants' actions clearly are a form of political speech protected by the First Amendment." 886 F.2d at 1363. The Second Circuit clearly acknowledged that the purpose of Operation Rescue demonstrations was to communicate the message "that abortion is wrong, immoral and must be stopped." 886 F. 2d at 1363.

As the United States has said in its Amicus Curiae Brief in Support of Petitioners' in *Bray* at p. 2-3:

> Petitioner Operation Rescue is an unincorporated association *with the principal goals of preventing abortions and ending the legalization of abortions*. Operation Rescue seeks to achieve these goals by, among other means, conducting "rescue" demonstrations at abortion clinics. . . During "rescue" demonstrations, petitioners obstruct the entrances to and exits from an abortion clinic, thereby effectively closing the clinic temporarily, preventing abortions from being performed for that period, and "rescuing" the fetuses that would otherwise have been aborted. Pet. App. 19a. The purpose of these demonstrations, as described in Operation Rescue's literature, is to "intervene between abortionists and the innocent victims," by "*physically* blockading abortion mills with [human] bodies." *Id.* at 20a (quoting *Operation Rescue, National Day of Rescue - October 29, 1988*. During such a demonstration, no person - male or female - is allowed by the

demonstrators to enter the clinic. (emphasis added).

For participation in one or more Operation Rescue demonstrations on May 6, 1988, October 29, 1988, January 13, 1989 and January 14, 1989, in the New York City area, the district court levied what it termed coercive civil contempt penalties and fines against the political protestors as follows:

Petitioner	Alleged TRO, Prel. or Perm. Injunction Violations	Unconditional Fines*
Rev. Jesse Lee	3	$100,000
Joseph Foreman	2	$ 25,000
Michael McMonagle	1	$ 25,000
Jeff White	1	$ 25,000
Rev. Robert Pearson	1	$ 25,000
Christopher Slattery	2	$ 25,000**
B.O.R.N.	1	$ 25,000
Randall A. Terry	3	$100,000***
Thomas Herlihy	1	$ 25,000
		$375,000

* 732 F. Supp. at 413-414 (A-89 to A-90); 961 F.2d at 394 (A-9). Fines were also assessed against non-petitioners Florence Talluto ($50,000 for 2 violations), Michael LaPenna ($25,000 for 1 violation) and Adelle Nathanson ($25,000 for 1 violation), for a total of $450,000.00. Talluto and LaPenna's fines were vacated by the court of appeals for lack jurisdiction due to improper service of the contempt papers. 961 F.2d at 398-400 (A-17 to A-21). Nathanson discontinued her appeal. Attorneys' fees were also assessed against all

contemnors by the district court and were upheld by the Second Circuit. 961 F.2d at 394-395 (A-7 to A-10).

** Slattery was fined $50,000, $25,000 of which was suspended.

*** Terry's and Operation Rescue's fines were joint and several.

It is these phenomenally large contempt penalties, and their attendant attorney's fees, that the Petitioners seek to have vacated by this Court.

REASONS FOR GRANTING THE WRIT

I. The underlying injunctive orders of the district court enforced by purportedly civil contempt fines and penalties rest on the identical legal grounds at issue in a case presently before this Court, *Jane Bray et al. v. Alexandria Women's Health Clinic, et al.*, No. 90-985

A. Federal Jurisdiction

Currently pending before this Court is the case of *Bray v. Alexandria Women's Health Clinic, cert. granted*, ____ U.S. ____, 111 S.Ct. 1070, 112 L.Ed. 2d 1176 (1991) (No. 90-985), which raises legal issues identical to those raised by Petitioners here.

In particular, Questions No. 4 in *Bray* is: "Are respondents' claims under *42 U.S.C. Section 1985(3)* so insubstantial as to deprive the federal courts of subject matter jurisdiction?" *Bray Pet. Cert.* at i. The "Questions Presented" section of this Petition contains the identical first four questions presented in the *Bray* case.

In view of the excessive monetary penalties assessed against the Petitioners, this Court should *either grant* and consider this case with *Bray or hold* this Petition pending this Court's decision in *Bray*. If this Court answers this fourth question in the affirmative, as the *Bray* Petitioners urge, then this Court can, without more, *either vacate and reverse* in their entirety the allegedly civil contempt judgments, fines and penalties assessed against the Petitioners in the case at bar *or vacate and remand* for further proceedings consistent with the *Bray* decision. As this Court has said in *United States v. United Mine Workers*, 330 U.S. 258, 195 (1947):

> The right to remedial relief falls with an injunction which events prove was erroneously issued . . . and a fortiori when the injunction or restraining order was beyond the jurisdiction of the court. . . If the Norris-LaGuardia Act were applicable in this case, the conviction for civil contempt would be reversed in its entirety. . . Assuming, then, that the Norris-LaGuardia Act applied to this case and prohibited injunctive relief at the request of the United States, we would set aside the preliminary injunction of December 4 and the judgment for civil contempt . . . (citations omitted).

The principle of allowing a non-party to defend a civil contempt citation by attacking the subject matter jurisdiction of the lower court to issue the order was recently affirmed in *U.S. Catholic Conf. v. Abortion Rights*, 487 U.S. 72, 101 L.Ed. 2d 69 (1988). In that case, the U.S. Catholic Conference of Bishops, a non-party, was held in civil contempt and fined $50,000 per day for disobeying a subpoena duces tecum to produce documents. The Catholic Bishops unsuccessfully challenged subject matter jurisdiction in the district court. The court of appeals limited the Bishops defense of the civil contempt

citation to the argument that "the district court lacked even colorable jurisdiction to hear the suit." 487 U.S. at 80. This Court reversed, holding that:

> When a district court elects to apply civil contempt to enforce compliance, it is consistent with that approach to allow full consideration of the court's subject-matter jurisdiction . . . Accordingly, on remand, the Court of Appeals must determine whether the District Court had subject-matter jurisdiction in the underlying action. If not, then the subpoenas duces tecum are void, and the civil contempt citation must be reversed "in its entirety." Mine Workers, supra, at 295, 91 L.Ed. 884, 67 S.Ct. 677. (487 U.S. at 79-80).

This Court forcefully stated:

> The right of a nonparty to appeal an adjudication of contempt cannot be questioned. . . Once the right to appeal a civil contempt order is acknowledged, arguments in its legitimate support should not be so confined that the power of the issuing court remains untested. . . The challenge in this case goes to the subject-matter jurisdiction of the court and hence its power to issue the order. The distinction between subject-matter jurisdiction and waivable defenses is not a mere nicety of legal metaphysics. It rests instead on the central principle of a free society that courts have finite bounds of authority, some of constitutional origin, which exist to protect citizens from the very wrong asserted here, the excessive use of judicial power. The courts, no less than the political branches of the

> government, must respect the limits of their authority. (487 U.S. at 76-77).

The court of appeals acknowledged that the district court could impose sanctions of civil contempt only if the 1985(3) claim was substantial. 961 F.2d at 395-396 (A-12 to A-14). If the non-party Petitioners in the case at bar and the *Bray* Petitioners are correct that the highly attenuated Ku Klux Klan Act claim of Respondents is insubstantial in a jurisdictional sense, then the purported civil contempt judgments with their fines and penalties "must be reversed in [their] entirety." *Catholic Conference*, 487 U.S. at 80. (quoting *United States v. United Mine Workers*). The three defendant Petitioners, Randall A. Terry, Operation Rescue and Thomas Herlihy, will benefit in the same manner if subject-matter jurisdiction is found to be lacking.

B. The Right to Interstate Travel

The most patently insubstantial aspect of the Respondents' purported federal claim under 42 U.S.C. Section 1985(3)[4] is the application of the right to interstate travel to Petitioners' anti-abortion demonstration activities. *See generally*

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[4] A *prima facie* case for relief under 42 U.S.C. Section 1985(3) must consist of alleging at least four necessary elements:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the law; (3) an act of furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

United Broth. of Carpenters and Joiners, Local 610 v. Scott, 463 U.S. 825, 828-29 (1983) (restating the test first formulated in *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971)).

Brief Amici Curiae of Daniel Berrigan, S.J. et al. in the *Bray* case (containing thorough analysis of Supreme Court decisions on the right to travel and concluding that the claims are jurisdictionally insubstantial as foreclosed by the prior decisions of this Court). As a threshold matter, there is no right to travel case factually analogous to rescue demonstrations of the type involved in this case. Such decisions involve infringement of the right to travel by state action, principally through discriminatory residency requirements.[5] The right to travel in its classic meaning ensures new residents the same right to *vital governmental benefits and privileges* in the states to which they migrate as they are enjoyed by other residents. *Califano v. Gautier Torres*, 435 U.S. 1 (1978).

In analyzing rescue demonstrations, United States District Judge A. Wallace Tashima has commented: "Whatever other legal rights and liabilities may be implicated by such conduct, there in no federal privilege or immunity of one class of persons not to have another class of persons engage in non-violent, civil disobedience."[6]

As the *Bray* Petitioners assert in their Main Brief at p. 25-26:

> The implications of the holding of the court of appeals are astounding. Virtually every business located in a city situated near a state border (e.g., New York, Philadelphia, Washington,

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[5] *See e.g., Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969). *Attorney General of New York v. Soto-Lopes*, 476 U.S. 898 (1986).

[6] *National Abortion Federation v. Operation Rescue*, No. CV-89-1181 (AWT) slip op. at 7 (C.D. Cal. January 31, 1990) (dismissing amended complaint with prejudice).

> D.C., Chicago, Portland, St. Louis, Minneapolis, and so forth), as well as every business located on a major interstate route or in the vicinity of a tourist site or commercial center, will serve numerous out-of-state customers on a regular basis. According to the holding of the court below, any sit-in or mass picketing at such a business would be a federal constitutional violation. . . This Court has never recognized a constitutional right to travel of such all-encompassing scope. . . The right to travel, however, is not an unlimited right to mere physical movement. . . . There is no general federal constitutional tort of obstruction of public or private passage.

See, Brief Amicus Curiae of United States in the *Bray* case at Section II. The right to interstate travel is not implicated where the Petitioners rescue demonstrations have only a *mere incidental effect upon travel*.

The application of the right to interstate travel to suppress traditional non-violent civil disobedience is nothing short of constitutional ambrosia - the creation of a federal cause of action where none exists.

C. Class Animus

In the court below, the finding that the class-based animus requirement was satisfied is premised upon a subset of gender: women seeking abortions. In rejecting this notion, United States District Judge A. Wallace Tashima has cogently

explained why this very class of "women seeking abortions" is not a class intended to be protected by the Ku Klux Klan Act[7]:

> The Court disagrees with the proposition that any "particular [sub]class of women," *id.*, is a protected class. For if the animus is directed at a particular class of women, then, by definition, it is not directed at other classes of women or at women as a class. If that is so, then the discrimination cannot be gender-based, it separates persons of the same gender from each other and, obviously, on a basis other than by gender. *The inquiry*, thus, *must be made without respect to gender, i.e.*, it is the *"seeking abortion" trait which animates the defendants' actions* and must be the basis for making the . . . [Section 1985(3)] analysis. (emphasis added).

As the United States argues in its *Bray* Amicus Curiae Brief at 15:

> Just as there is no gender-specific position concerning other moral questions, so, too, there is no specifically "male" or "female" point of view with respect to abortion. . . Respondents also overlook that a substantial number of women oppose abortion. That fact distinguishes this case from *Griffin v. Breckenridge*, in which there was no suggestion that a substantial number of blacks opposed granting blacks the right to vote. In other words, petitioners' anti-abortion demonstrations are not a form of

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7 *National Abortion Federation v. Operation Rescue*, 721 F. Supp. 1168, 1170 (C.D. Cal. 1989).

gender based discrimination because they are aimed at a *practice*, not a type of *person*.

According to the Respondents, early American feminists, many of whom adamantly opposed abortion as the "murder of the innocents" would possess the requisite gender based animus for purposes of 42 U.S.C. Section 1985(3). *See generally*, Brief of Feminists for Life in America, et al, as Amici Curiae in the *Bray* case.

II. The Second Circuit Erroneously Held That The Contempt Fines Imposed by The District Court Were Civil in Nature

The fact that the lower courts have conveniently denominated their penalty civil coercive contempt is not controlling and should not be allowed to defeat applicable protections of federal constitutional law. *Hicks v. Feiock*, 485 U.S. 624, 631 (1988). The unconditional and punitive character of the court's contempt proceeding orders made the contempt criminal. *Hicks v. Feiock, supra*, 485 U.S. at 632-633. So did their irrational severity, 100 times the criminal fine for the same offense in the absence of any damage to Respondents.[8] *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 1901-1904 (1989). Since none of the due process protections, required in criminal proceedings, were afforded Petitioners, the contempt judgments must be reversed. *Young v. U.S. Ex Rel. Vuitton Et Fils S.A.*, 481 U.S. 787, 798-99 (1987).

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[8] The private Respondents during the contempt proceeding in the court below submitted arrest lists of some of the individual Petitioners, which lists show that they were charged with disorderly conduct, a violation, which carries a maximum fine of $250.00. See, New York Penal Laws, sections 240.25 and 73.

In the decision below, the court of appeals relied upon its prior decision in this case, *New York State National Organization for Women*, 886 F.2d at 1350-1351, which stated "[a]bsent the threat of imprisonment, the Constitutional due process protections generally are not required in a civil contempt proceeding." This analysis reveals the unorthodox view that due process protections are generally inapplicable to situations involving monetary sanctions. Nothing could be further from this Court's jurisprudence.[9]

The criminal nature of the contempt judgments is further revealed by their punitive quality (to vindicate the authority of the court), and not as "remedial, and for the benefit of the complainant." *Gompers v. Buck's Stove & Range*, 221 U.S. 418, 441 (1911). *Re Christian Engineering Co.*, 194 U.S. 458, 24 S.Ct.729, 47 L.Ed. 1072 (1903), involved the defendant's appeal of a $1,000.00 contempt fine in a patent suit for "disobedience of a preliminary injunction . . . . The fine was payable, one half to the United States and the other half to the complainant." 194 U.S. at 459. In explaining the criminal nature of the fine, this Court said:

> These authorities show that when an order imposing a fine for violation of an injunction is substantially one to reimburse the party injured by the disobedience, although called one in a contempt proceeding, it is to be regarded as merely an interlocutory order, and to be reviewed only on appeal from the final decree.

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[9] *Penfield v. Securities & Exchange Commission*, 330 U.S. 585, 592-595 (1947) (an unconditional $50.00 fine was a criminal sanction), *Union Tool v. Wilson*, 259 U.S. 107, 110 (1922), (a $2,500 fine payable to the court was a criminal sanction); *Nye v. United States*, 313 U.S. 33, 34 (1941) (unconditional fines payable to the United States carry the criminal hallmark); *Hicks v. Feiock*, *supra*.

> In the present case, however, the fine payable to the United States was clearly punitive and in vindication of the authority of the court, and, we think, as such, it dominates the proceeding, and fixes its character. 194 U.S. at 460, 461.

In *Re Merchants' Stock & Grain*, 223 U.S. 639, 32 S.Ct. 339, 56 L.Ed. 584 (1912), contempt fines totalling $3,500, imposed for disobedience of a preliminary injunction, payable 75% to the plaintiff and 25% to the United States, were held to be criminal in nature, relying on *Christian Engineering, supra*.

Citing both *Christian Engineering* and *Merchants Stock & Grain*, Justice Brandeis, in *Union Tool Co. v. Wilson*, explained that:

> Where a fine is imposed partly as compensation to the complainant and partly as punishment, the criminal feature of the order is dominant and fixes its character for purposes of review.

259 U.S. 107, 110 (1922). The instant contempt fines totalling $375,000, are not even a mixture of compensatory and punitive, but are payable solely to the United States. They are not compensatory; they are punitive and as such, criminal in nature.

The fact that the Second Circuit on its prior opinion, 886 F.2d 1339, modified the November 3, 1988, $50,000 Contempt Judgment, to be payable to the court (the United States) and not to the private Respondent N.O.W., reveals that the present contempt fines are clearly punitive in nature and not remedial and for the benefit of the complainant. Moreover, the fines are

clearly "intended as a deterrent to offenses against the public"[10] and "to punish the act of disobedience as a public wrong."[11]

Regarding unconditional versus conditional sanctions, this Court has often stated that a civil contempt sanction must have a mechanism whereby the contemnor can subsequently comply with the court's order and thereby purge himself of the contempt. *See, Shillitani v. United States*, 384 U.S. 364, 371 (1966); *Hicks v. Feiock, supra*; *Penfield v. Securities & Exchange Commission, supra*; *Doyle v. London Guarantee & Acc. Co.*, 204 U.S. 599, 51 L.Ed. 641, 644 ("compliance with the order relieves from payment."). When unconditional contempt fines were entered against the Petitioners, there was nothing the Petitioners could have done to purge themselves of the contempt. The judgments were therefore, *ipso facto*, criminal in nature.

The Second Circuit's reaffirmation (961 F.2d at 395 (A-12)) of its prior ruling (886 F.2d at 1350-1351) that the Petitioners' opportunity to comply with the order came *before* a violation occurred only manifests the invalidity of the Second Circuit's reasoning and suggests that due process is truly turned on its head when pro-life demonstrators are in the dock. The purge mechanism doctrine comes into play *after* a party is adjudged in contempt, so that the sanction is imposed with *conditions* which allow the contemnor to escape the sanction by compliance with the order. This case involves, however, violations of orders to refrain from prohibited action which

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[10] *Nye, supra*, 313 U.S. at 42.

[11] *Michaelson v. United States*, 266 U.S. 42, 65 (1924).

cannot be purged; the only appropriate response of a court is to punish past conduct, which is classic criminal contempt.[12]

These conditionality and purge mechanism requirements for civil contempt have been uniformly followed by other circuit courts,[13] as well as other Second Circuit decisions.[14] Apparently then, the only reason they were not applied here is the grim reality that in cases involving abortion rights, "a permissible reading of the [law] is to be avoided at all costs." *Thornburgh v. American Coll. of Obst. & Gyn*, 476 U.S. 747, 812 (1986) (White, J., dissenting).

CONCLUSION

For the foregoing reasons and those of the *Bray* Petitioners and their Amici Curiae supporters, the Petitioners pray that this Petition be granted and that the contempt

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12 *See also, Crozer-Chester Medical Center v. Moran*, 560 A.2d 133 (Pa. 1989) (contempt against anti-abortion protester adjudged to be criminal).

13 *Douglas v. First National Realty Corp.*, 543 F.2d 894 (D.C. Cir. 1971); *United States v. Miller*, 540 F.2d 1213 (4th Cir. 1976); *United States v. Spectro Foods*, 544 F.2d 1175 (3rd Cir. 1976); *United States v. North*, 621 F.2d 1255 (3rd Cir. 1980); *In re Stewart*, 571 F.2d 958 (5th Cir. 1978); *Falstaff v. Miller*, 702 F.2d 770 (9th Cir. 1983).

14 *In Re Grand Jury Witness*, 835 F.2d 437, 442 (2d Cir. 1987) *cert. denied sub nom. Armabulo v. United States*, 485 U.S. 1039 (1988) (stating a $50,000 fine was clearly criminal contempt); *U.S. v. Ayers*, 866 F.2d 571 (2nd Cir. 1989) (determinate sentence vacated because of absence of purge mechanism); *Hess v. New Jersey Transit Rail Operations, Inc.*, 946 F.2d 114 (2d Cir. 1988) (unconditional fine vacated).

judgments assessing $375,000 in fines with their attendant attorneys' fees, against the defendants and non-party Petitioners be *either vacated and reversed* in their entirety *or vacated and remanded* for further proceedings consistent with this Court's decision in *Bray*.

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Respectfully submitted,

MICHAEL P. TIERNEY
A. LAWRENCE WASHBURN, JR.
Legal Center for the
Defense of Life
286 Fifth Avenue,
Suite 707
New York, NY 10001
(212) 695-1955

JOSEPH P. SECOLA
(Counsel of Record)
The Rutherford Institute
of Connecticut
P.O. Box 1108
8 South Main Street
New Milford, CT 06776
(203) 355-0923

Attorneys for Petitioners